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A  
PRACTICAL TREATISE  
ON THE  
LAW OF PARTNERSHIP,  
WITH  
AN APPENDIX OF PRECEDENTS  
AND  
A SUPPLEMENT,  
CONTAINING  
ALL THE NEW DECISIONS.

BY  
NEIL GOW, ESQ.,  
OF LINCOLN'S INN, BARRISTER AT LAW.

Third Edition,  
WITH CONSIDERABLE ALTERATIONS AND ADDITIONS.

LONDON:  
SPETTIGUE AND FARRANCE, LAW BOOKSELLERS,  
67, CHANCERY LANE.

BAR ASSOCIATION

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1841



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A

# PRACTICAL TREATISE

## ON THE

# LAW OF PARTNERSHIP.

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## CHAPTER I.

### OF THE CONTRACT OF PARTNERSHIP.

PARTNERSHIP has been thus described by an eminent writer on the civil law : *contractus societatis est, quo duo, pluresve, inter se pecuniam, res, aut operas conferunt, eo finè ut, quod inde reddit lucri, inter singulos pro ratâ dividatur.* (a) This definition, it has been observed, is good only as between the parties, but not with respect to the world at large. (b) To render a partnership complete, a communion of loss as well as profit is essential (c). The shares of the parties must be joint, though it is not necessary that they should be equal : and the parties jointly interested in the purchase must also be jointly concerned in the future sale. (d) Partnership, therefore, in its extended and complete sense, is a voluntary contract, between two or more persons, for joining together their money, goods, labour, and skill, or either or all of them, upon an agreement, that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade. (e)

Every person *sui juris* is competent to contract the relation of partner. An infant may, by law, be a partner, and he will be entitled to all the benefits resulting from the partnership,

(a) Puffendorf, lib. 5. cap. 8.

(b) Waugh v. Carver, 2 H. Bl. 246.

(c) Coope v. Eyre, 1 H. Bl. 37.

(d) Ibid.

(e) Wats. on Partn. 1.

B

although he will not be liable for the losses, if he choose to avail himself of his minority. (a) But a *feme covert* cannot sustain the character of partner, because she is legally incapable of entering into the contract of partnership; and although married women are not unfrequently entitled to shares in banking-houses, and other mercantile concerns, under positive covenants, yet, when this happens, their husbands are entitled to such shares, and become partners in their stead.

The contract of partnership may be divided into the two classes of public and private. It may be denominated public, where the association consists of an indefinite or a large definite number of joint undertakers; and private, where a few individuals only connect themselves together. The former is usually called a company or society, and is instituted to carry on some important undertaking, for which the capital and exertions of a few individuals would be insufficient. Of these, some are incorporated by letters patent, or act of parliament, such as the *East India Company*, and the *Bank of England*; others are not, such as most of the Fire and Life Insurance Companies.

Those companies or societies, which are not confirmed by public authority, are in fact nothing more than ordinary partnerships, and the laws respecting them are the same (b); but the articles of agreement between the parties are usually very different. The capital is generally divided into a certain number of shares, whereof each partner may hold one or more; but he is restricted to a certain number. Any partner can also transfer his share, under certain limitations; but no partner acts personally in the affairs of the company; the execution of their business being entrusted to officers, for whom the whole company are responsible, though the superintendency of such officers is frequently committed to directors, chosen from the body at large.

There are likewise trading companies established by public authority. The king, by his charter, may constitute fraternities or companies for the management of foreign or domestic trade. (c) Since trade cannot be maintained and increased with-

(a) *Goode v. Harrison*, 5 B. & A. 150. But an infant partner, who, on attaining the age of majority, does not disaffirm the partnership, is responsible on contracts subsequently made by the firm. *Id. ibid.* and see *Glossop v. Colman*, 1 Stark. N. P. C. 25.

(b) *Rex v. Dodd*, 9 East, 516. *Beaumont v. Meredith*, 3 Ves. and Bea. 180.

(c) *Com. Dig. Tit. Trade, B. Darcy v. Allen*, cited in the city of London's case, 8 Rep. 125.



out order and government (*a*), therefore the king may erect *gildam mercatoriam* for the advantage of trade (*b*); and none but the king can erect a society for trade, or public trading company. (*c*) But the king, by his charter, cannot make a total restraint of trade, for such a patent would be void. (*d*)

A royal charter is necessary to enable a company to hold lands, to have a common seal, and enjoy the other privileges of a corporation; but a charter is sometimes procured merely to limit the risk of the partners; for, in every private unincorporated company, the members are liable for the debts without limitation (*e*): in incorporated societies, they are only liable to the extent of their shares in the stock of the society. Sometimes trading companies are authorised by act of parliament; but this high authority is only necessary to confer exclusive privileges, which, by the principles of the common law, cannot be granted by the king's charter. (*g*)

Not any one of the public trading companies, incorporated by royal charter, or act of parliament, are to be considered as partnerships, within any of the legal principles applicable to partnerships formed by the voluntary agreement of individuals. For in such public companies, where a trade is to be carried on under the corporate name in joint stock (as in the case of the *East India Company*, &c.), the members, as such, are not objects of the bankrupt laws (*h*); and there are express provisions, that they are not to be liable, on account of the joint trade, in their individual capacities; nor one of them for the debts or engagements contracted by others; but only for their respective shares or interest in the joint stock, and that upon trade and contracts carried on or made in the corporate character. Therefore, if one or more persons enter into such a society, and become sharers of the property and joint stock, yet such an association does not constitute a partnership, according to the custom of merchants, nor within the principles of law established respecting joint traders.

To contract the relation of private, as it has been distinguished from public partnership, no charter or licence is

(*a*) Com. Dig. Tit. Trade, D.

(*b*) City of London's case, *supra*.

(*c*) *East India Company v. Sandys*, Skinn. 224.

(*d*) *Darcy v. Allen*, *supra*. See also 3 Mod. 132. *East India Company v. Evans*, 1 Vern. 307.

(*e*) *Rex v. Dodd*, 9 East, 516.

(*g*) *Kyd on Corporations*, 1st vol. p. 61.

(*h*) 6 Geo. IV. c. 16, s. 2.

necessary ; the bare consent of the parties being, for this purpose, sufficient. Such consent may be testified, either in express terms, as by articles of copartnership, or positive agreement ; or the assent may be tacit, and to be implied solely from the acts and conduct of the parties. (a) An implied, or presumptive assent, has equal operation with one that is express and determined. Thus, to constitute a partnership *inter se*, the existence of written articles is not essential, the mere act of trading jointly being sufficient for that purpose ; and with respect to the world, it may be laid down as an undeniable proposition, that persons having a mutual interest in the profits of any business, or particular branch of business, carried on by them, or persons appearing ostensibly as joint traders, are to be recognised and treated as partners, whatever may be the nature of the agreement under which they act, or whatever motive or inducement may prompt them to such an exhibition. (b) But a joint possession has not, *per se*, the effect of converting the possessors into partners. A joint possession, or the holding of something in common among many, does not necessarily imply the reciprocal choice of the parties ; on the contrary, several may hold a thing in common, independently of their own original free election. Of this latter class are the joint donees or joint legatees of one and the same thing, or those who, through other causes, chance to hold something between them, which is not divided, and is to be possessed in common, without any mutual agreement. The free and personal choice of the parties is so essentially necessary to the constituting of a partnership, that even the executors and representatives of deceased partners themselves do not, in their representative capacity, succeed to the state and condition of partners (c), although a community of interest necessarily exists between them and the surviving partners, until the affairs of the partnership are wound up. (d) And, on the same principle, one partner can in

(a) Under the Romans, the social contract or partnership needed no other solemnity but the consent of parties, without any writing at all ; and Barbeyrac, in his notes on Puffendorf, observes, that a partnership is contracted sometimes *tacitly* ; where, for example, a thing being bought in common is not divided, but the parties interested, without explaining themselves further, enjoy it equally, each sharing in the profit that arises, and contributing his own proportional part in the necessary expenses for its maintenance.

(b) *M'Iver v. Humble*, 16 East, 174.

(c) *Pearce v. Chamberlain*, 2 Ves. sen. 34.

(d) *Ex parte Williams*, 11 Ves. 3.

no instance, without the consent of his copartners, introduce a stranger into the concern as a partner, although he may charge his own undivided interest to any extent he pleases in favour of that stranger. (a)

The law of *England* permits only those mercantile associations which are sanctioned by justice and sound policy. It follows, therefore, that the object of every partnership must be the adventuring in some lawful trade or business. By the civil law it is well established, that no partnership can be contracted, except it have relation to fair trade or commerce, or some other thing that is honest and lawful: every partnership, formed on a basis at variance with such principles, being considered not only improper but unjust. *Si maleficii societas coita sit, constat nullam esse societatem; generaliter enim traditur, rerum inhonestarum nullam esse societatem. Societas flagitiosæ rei nullas vires habet. Delictorum turpis atque fœda communio est.* Nor, according to the laws of this country, is there any sound distinction to be made between an association, for the purpose of engaging in transactions which are *mala in se*, and those which are *mala prohibita*; the latter, as well as the former, tending to encourage a breach of the law, and it being equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited because it is against good morals, or whether it be prohibited because it is against the interest of the state. (b) Thus, a partnership for importing prohibited goods (c), or making time bargains in the funds, would be held illegal and invalid, not less than a partnership for keeping a disorderly house, or robbing on the highway. But if the object contemplated by persons associating themselves together as partners, do not contravene either the law of nature, or the municipal law of the land, it will be valid, although it do not relate to trade. Partnerships are not necessarily confined to trades or commercial adventures. They may lawfully subsist in cases unconnected with mercantile speculations. For instance, a partnership may exist between attorneys or farmers, as well as between merchants or bankers. (d) Nor does it follow, from

(a) *Bray v. Fromont*, 6 Madd. 5.

(b) *Bensley v. Bignold*, 5 B. & A. 331. *Aubert v. Maze*, 2 Bos. & Pul. 371.

(c) *Biggs v. Lawrence*, 3 T. R. 454. *Webb v. Brooke*, 3 Taunt. 13.

(d) *Per Gould J.*, *Coope v. Eyre*, 1 H. Bl. 37.



the contraction of the relation of partners, that the persons contracting it are indiscriminately united as general partners; for a partnership may be limited to a particular branch of business, without extending to all the concerns in which any member of the firm may chance to be engaged. (a) Thus, two merchants may join in sending out a cargo of goods to a foreign country. As to this adventure, they have all the rights, and are subject to all the liabilities of partners; but the relation of co-partnership between them ceases with it, and at no time extends to any of their other concerns. So, several may be interested in a chattel, and agree to manage it at their mutual expense, and for their mutual profit; *quoad hoc* they are partners. In like manner, if two persons, who are not partners in trade, draw a bill of exchange payable to themselves or their order, they are partners as to the transaction of the bill, but, in every other respect, they continue perfectly distinct. (b) So, if a number of persons associate together and subscribe sums of money for the purpose of obtaining a bill in parliament to make a railway, they are *pro hac vice* to be treated as partners. (c)

When the object or purpose the partners have in view, in forming a partnership, is clearly and distinctly defined, and the contract of partnership does not expressly or impliedly confer upon some the power of binding all to the adoption of different projects, it is not competent to any number of the partners, short of the whole of them, to engage the partnership in adventures which are incompatible with the declared object or purpose; because, if it were so, an individual, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. Each partner, therefore, has the power of insisting that the original contract of partnership shall not be contravened by an extension of its purposes; and he is not deprived of that power, notwithstanding the other partners offer to indemnify him against the loss that may be sustained by their embarking in transactions which were not, in the first instance, intended to form a part of the partnership concern: for, whilst the partnership continues, the right of a partner is to hold his co-partners to the

(a) *Per Lord Mansfield, Willett v. Chambers*, Cowp. 814. See also *Robey v. Howard*, 2 Stark. N. P. C. 557. (b) *Carvick v. Vickery*, Dougl. 653. n.

(b) *Holmes v. Higgins*, 1 B. & C. 74.

specified purposes of their association, and not to rest upon indemnities with respect to what he has not contracted to engage in. (a) And this principle (upon which a court of equity will act in the case of a common partnership) applies with equal force to all companies or societies whose objects are, at the time of their institution, defined, and who are not purposely invested with a power of binding the body by a majority, or any select part of it. Such companies, if there be one dissentient member, cannot embark in undertakings not originally contemplated; nor can they compel that member to retire from the company on receiving his subscribed capital and interest, in order thereby to leave them at liberty to pursue their extended operations. And it is not a sufficient answer to the requisition of the shareholder who calls upon the company to observe the objects for which the company was formed, to urge, that he may dispose of his shares at a price considerably beyond what he gave for them; because, for that very reason, coupled with having the partnership concern carried on according to the contract, he may expect augmented improvement in the value of his shares. (b) A covenant, in articles of partnership, that none of the partners shall carry on, for their respective private benefit, that branch of commerce in which they are jointly engaged, is not only allowed, but is the constant course. (c) Indeed, the principles of a court of equity will not permit that parties bound to each other, by express or implied agreement, to promote an undertaking for their common benefit, should any of them engage in another concern, which necessarily gives them an interest directly adverse to their original undertaking. (d)

In considering the constitution of a partnership, the inquiry will be chiefly directed to its requisites in relation to strangers or the world at large. *Inter se* a difficulty seldom arises. The question is generally, not between the parties, as to whether a partnership is formed, or what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. For when a partnership is entered into by persons

(a) *Natusch v. Irving*, Appendix, *post*.

(b) *Id.*, *ibid*.

(c) *Morris v. Colman*, 18 Ves. 438.

(d) *Glassington v. Thwaites*, 1 Sim. and Stu. 133. And see *Burton v. Woolley*, 6 Mad. 367.

engaging in a commercial or any other trade or speculation, there is usually a contract or agreement between the parties, providing for its existence, and defining the rights of the partners respectively. By this contract, where it subsists, the partnership is regulated: if there be not an express agreement, the partnership, as regards its regulation, is governed by the contract implied by the law from the relation of the parties. In the latter case, the concurrent opinion of all the writers on the civil law is, that the loss must be equally borne, and the profits equally divided. (a) And by the law of *England*, where a partnership is constituted by the mere act of trading jointly, each of the persons so trading, though liable to creditors to the whole extent of the losses, is only responsible *inter se* for his own aliquot proportion of them; and, with respect to the profits, each will be considered as equally interested in the joint concern, unless the contrary be made to appear. There is, indeed, a *nisi prius* decision, in which it seems to have been assumed, that each member of a firm is not, in all cases in which the rights of the partners are undefined, necessarily entitled to an equal share of the profits. In that case, a father, on his son's coming of age, told him that he should have a *share* in his business, and the son was held out to the world as a partner, and acted, in that capacity, between five and six years; and upon an issue, out of Chancery, to ascertain the son's interest, Lord *Ellenborough* said, that he was not to be presumed to be entitled to a moiety, on account of the indefinite nature of the agreement, but left it to the jury to consider what was a fair proportion, under the particular circumstances of the case; and the jury gave the son one fourth part of the profits. (b) But Lord *Eldon* has expressed his dissatisfaction at the result of this issue, observing, that he had no conception of the principle upon which a jury, on the footing of a *quantum meruit*, could have held the son entitled to a quarter share only; for, as no distinct proportion was ascertained, by force of any express contract between the parties, they must, of necessity, have been equal partners, if partners in any

(a) *Et quidem si nihil de partibus lucri et damni nominatim convenerit, æquales scilicet partes et in lucro et in damno spectantur. Quod si expressæ fuerint partes, hæc servari debent. Nec enim unquam dubium fuit, quin valeat conventio, si duo inter se pacti sint, ut ad unum quidem duæ partes et lucri et damni pertineant, ad alium tertia.* Instit. lib. 3. t. 26. s. 1.

(b) *Peacock v. Peacock*, 2 Campb. 45.



thing. (a) However, articles of partnership are, in most cases, executed at the time the partnership is constituted, and they are capable of being determined legally by their expressive form. The duties and obligations, as well as the rights of the partners *inter se*, being ascertained and defined by the several provisions contained in such articles, they are regulated, and can alone be enforced, consistently with the terms and stipulations agreed upon. With reference to their own individual interests, and as a matter of private arrangement, joint traders may stipulate among themselves that they are severally to be responsible only for their own losses and defaults, or they may contract for any specific apportionment of the losses in their discretion. The same observation applies to the profits, the division and distribution of which is more peculiarly the object of compact or agreement. In fact, the various stipulations and provisions, relating to the commencement of the partnership (b), the manner in which the business is to be conducted, the space of time for which the partnership is to endure, the capital each is to bring into the trade, the proportion in which the profits and loss are to be divided, the time and manner agreed upon for settling the accounts, the powers and duties of the partners in regard to conducting the business, and entering into engagements which may affect the co-partnership, the mode in which the partnership may be dissolved, together with the various covenants adapted to the circumstances of each particular case, are purely and entirely the subject of personal and private agreement and arrangement; and, in whatever way they may ultimately be settled, they cannot be impeached, unless they interfere with or contravene any rule or principle of law. But although, where a partnership has, for its basis, written articles, the different provisions of which have been acted upon and observed by the partners, those articles are to be regarded as supplying the rule by which to determine any disagreement between them, yet the subsequent transactions of the partners may control and supersede clauses in those articles, or may furnish evidence of a new agreement different from the written articles, provided those transactions show a probability, amounting almost to demonstration, that the articles were otherwise intended; for, whatever may be the language of a partnership-

(a) S. C. 16 Ves. 55.

(b) See *Williams v. Jones*, 5 B. & C. 108.

deed, the dealings and transactions among the partners may be such as to amount to distinct evidence, that some of the articles in that deed were waived by all parties, and were not to be considered as rules which should regulate the rights and duties of the partners. (a)

A partnership may legally subsist as between individuals and the world, and yet not as between the individuals themselves. For the former purpose, appearing as partners, or participating in the profits of a trade, is sufficient; for the latter, the parties must have joint shares in the stock, and must be jointly interested in the general trade or the particular adventure. (b) Thus, where it was agreed between two persons that one of them should furnish goods on an adventure, the profits of which were to be equally shared with the other, it was held, that as between themselves, no partnership was formed, for that the division of profits was merely a mode of remunerating trouble and credit; but that they were liable as partners to third persons. (c) And a right to share in the profits of a particular adventure will render a person liable to third persons, as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but still it does not invest him with the character of partner *inter se*, nor does it give him any interest in the property itself which is the subject-matter of the adventure; the power over the property remains in the person who furnished the capital with which it was purchased. (d) And, notwithstanding a person, who is not in fact a partner, may incur the responsibilities of a partner to those who are unconnected with the firm, it does not follow that he contracts the same responsibilities as between himself and the firm. For although a joint and mutual liability necessarily attaches upon, and results from, a co-partnership, it is not a consequence that it necessarily constitutes one, or that, as there can be no partnership without a joint responsibility, there can be no joint responsibility without a partnership. Thus, a servant or manager, engaged in a partnership concern, who acts as one of the partners in the partnership, is unquestionably a

(a) *Geddes v. Wallace*, 2 Bligh, 270., and see *Jackson v. Sedgwick*, 1 Swanst. 469. *Petty v. Janeson*, 6 Madd. 146.

(b) *Hesketh v. Blanchard*, 4 East, 141.

(c) *Id. ibid.*

(d) *Smith v. Watson*, 2 B. & C. 401.

partner with respect to the world, and liable for loss to the creditors of the partnership, yet he is not so liable as between himself and his employers. Such a partner stands distinguished from the others in the nature of his interest ; he is one capable of being dismissed at any time, and, as he has no stock in the partnership, he consequently can exercise no dominion over any part of it. It would, indeed, be singular if he were to be held responsible *inter se* ; because if, in any one year, his proportion of a loss amounted to a sum which equalled or fell short of his salary, that proportion would substantially or *pro tanto* extinguish his right of claiming the salary. Therefore, in a case which was recently before the House of Lords, in which it appeared that the appellant was engaged as manager of the *Glasgow Glass-work Company* at an annual stipend, and that, for the purpose of creating an addition to his stipend, and thereby of securing his skill and industry, he was also to have a share of the profits, to be calculated according to a proportion of capital and stock not advanced by him, but assigned by way of nominal interest ; it was determined that he was not a partner subject to loss in account with the other partners. And in that case it was also considered that the manager was not liable for loss, although it was expressed in the articles of partnership that the partners (not excepting the manager) were to be *subject to profit and loss*, and although the manager signed the partnership books, joined in securities given by the partnership, and in most other partnership acts, including the advertisement for a dissolution ; because it appeared, from the general structure, and all the provisions of the contract taken and construed together, as well as from the transactions between the parties and the conduct of the other partners, that the provision, as to profit and loss, was not intended to apply to the manager. (a) In a late case it was held that the assignee of a partner, who had never been acknowledged a partner, nor been permitted to act in

(a) *Geddes v. Wallace*, 2 Bligh, 270. The partnership was dissolved in 1792, and no demand was made of the losses until 1807, although in the intermediate time the parties were engaged in a protracted litigation, which furnished occasion to make the claim, if the right existed ; and it was decided that although the partnership articles and the transactions of the partners might have supplied unequivocal proof of the liability of the manager to loss, yet that the laches of the respondents would have so weakened and destroyed that proof, as that a court could not have acted upon the effect of it. *Id. ibid.*



that character, did not, by mere acceptance of the assignment, incur a liability for losses as between himself and the other partners. (a)

We will now consider what constitutes a partnership, as regards persons dealing or contracting with parties standing in the relation of joint traders ; and, in this investigation, the question, what constitutes a partnership *inter se*, will both directly and incidentally arise. But it may be premised, that, wherever the existence of a partnership, as to third persons, is established, the presumption of law is, that a partnership exists between the parties themselves. (b)

The question, to whom the character and denomination of partner, with respect to third persons, attaches, will, in the manner we propose to examine it, admit of consideration under three different heads : In the *first* place, we will inquire what constitutes an actual ostensible partner ; *secondly*, what satisfies the appellation of a secret or dormant partner ; and *thirdly*, we will state what is sufficient to fix upon a party the character of a nominal partner. An actual ostensible partner is a party who not only participates in the profits and contributes to the losses, but who appears and exhibits himself to the world as a person connected with the partnership, and as forming a component member of the firm. A dormant partner is likewise a participant in the profits and a contributor to the losses of the trade ; but his name being suppressed and concealed from the firm, his interest is consequently not apparent. A nominal partner has not any actual interest in the trade or its profits, but, by allowing his name to be used, he holds himself out to the world, as apparently, having an interest.

An actual ostensible partner, *quà* partner, is clearly answerable for the debts and engagements of the partnership. In

(a) *Jefferys v. Smith*, 3 Russ. 158. Where A., a partner in a concern, entered into an executory contract with B. to assign his interest in the business, and the latter interfered and acted as a partner, but subsequently assigned his share, and gave notice to the other partners of his having withdrawn, and afterwards refused to complete the contract of purchase with A., on the ground that a good title could not be made ; it was determined that as between the partners, B. was liable to contribute to the partnership losses up to the time of assigning and giving notice of his withdrawal, but that such liability thereupon ceased, and the assignment was not the less effectual, though made to an insolvent party, and in order to put an end to that liability. *Id. ibid.*

(b) *Peacock v. Peacock*, 2 Campb. 45.

his person, all and more than is necessary to entail liability is concentrated. He is entitled to a proportionate share in the distribution of the profits, and his name is likewise, with his own consent, introduced as composing a constituent part of the firm. Either his right to a share of the profits, or the permitted exhibition of his name as partner, would be sufficient to render him responsible. The former would subject him to liability, because strangers, or third persons, in the consideration of the law, give credit and trust to the general profits of the trade, and consequently to each and all of the persons participating or concerned in the profits, as if they were partners: and the latter would be equally effective against him in that respect, since third persons, dealing with the firm, have a right to conclude that a party who, by his own acts, identifies himself with the partnership, in the character of partner, does actually and in fact sustain that character with which he represents himself to be clothed. There can be no doubt, indeed, but that such a person fills the relation of partner with respect to strangers. It will, in this place, therefore, be only necessary to observe, in respect to joint stock companies, that a party, paying his deposit on shares, and afterwards signing the deed of partnership, has been held to be a partner from the time of depositing, as a recognition of the payment in a transaction connected with the partnership, and consequently liable for all supplies subsequent to that period. (a) We will now proceed to examine in what cases a party partaking of the profits of a trade, but whose name is not suffered to appear in the co-partnership firm, is considered as superinducing a liability as partner, in respect to the fulfilment of the engagements of the partnership. This inquiry will, in a great measure, have for its object the ascertainment of what constitutes a dormant partner, since, except in the instance of such a partner, the question but seldom arises.

It may be laid down as a clear and well-established principle of law, founded upon reasons of policy, that whoever has a right to share in the profits of a trade, or particular adventure, or has a specific interest in the profits themselves, as profits, becomes chargeable as a partner to third persons, in respect of transactions arising out of the trade or particular adventure, in the

(a) *Lawler v. Kershaw*, 1 M. & Mal. 93. And see *Vice v. Lady Anson*, *Ib.* 96. S. C. 1 Mann. & Ryl. 113. and 7 B. & C. 409.

profits of which he is to participate. (a) The reason why such a person becomes, by implication and operation of law, clothed with the character of partner, is, that by the effect of the agreement for a participation, the party participant takes from the creditors a part of that fund which is the proper security to them for the satisfaction of their debts, and upon which they rely for payment. (b) Another reason assigned for subjecting a dormant partner to responsibility is, that if he were exempted, he would receive usurious interest for his capital, without its being attended with any risk. (c) The general principle was recognised in a modern case, where an agreement, which did not constitute a partnership between the parties to it, was nevertheless held to subject them to responsibility, in the character of partners, to third persons. In that case (d), A., having neither money nor credit, proposed to B., that if he would order, with him, certain goods to be shipped upon an adventure, *if any profit should arise from them*, B. *should have one half for his trouble*; and B. having acceded to this proposition, it was decided that he was liable as a partner to creditors, although the contract did not constitute a partnership between A. and B., but was merely an agreement for a compensation for trouble and credit. And it has been determined, that an agreement between a merchant and a broker, that the latter should purchase goods for the former, and, in lieu of brokerage, should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses, did not vest in the broker any share in the property so purchased, or in the proceeds of it, although it rendered him liable as a partner to third persons. (e) The same principle was acted upon in another case. (g) There a merchant in *London* recommended consignments to a merchant abroad; and it was agreed, that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses: and it was deter-

(a) *Metcalf v. Royal Exch. Ass. Company*, Barnard, 343. *Grace v. Smith*, 2 Blacks. 998. *Ex parte Hamper*, 17 Ves. 404. *Ex parte Langdale*, 18 Ves. 301. *Ex parte Gellar*, 1 Rose, 297. *Fromont v. Coupland*, 2 Bingh. 170.

(b) *Per De Grey C. J.*, *Grace v. Smith*, *supra*.

(c) *Per Lord Mansfield*, *Hoare v. Dawes*, 1 Dougl. 371.

(d) *Hesketh v. Blanchard*, 4 East, 143.

(e) *Smith v. Watson*, 2 B. & C. 401. And see *Reid v. Hollinshead*, 4 B. & C. 867.

(g) *Cheap v. Cramond*, 4 B. & A. 663.



mined, that as this was a participation in profit, it constituted a partnership between the parties. And where a broker, employed to purchase goods for a firm, was to act free of commission, and to be one third interested in the adventure, he was held to be a partner with his employers. (a) So, where the clerk of an attorney, living in a distant town, transacted business in the name of the latter for his own benefit, but made an allowance of one third of the profit to the attorney, by way of remuneration to him for his occasional superintendence of the business, Mr. Justice *Richardson* was of opinion, that such a division of the profits, notwithstanding its illegality, amounted to a partnership. (b) On the same principle, where the creditor of a firm agreed to share in the profit and loss of an adventure of which the goods were to be supplied by his debtors, and his debt was to be reimbursed to him from the returns of the adventure, and after that he was to have his share of profit proportionable to the amount of the sum due to him; on an action by the seller of the goods against the creditor and his debtors, it was held that they were partners in this transaction, and therefore jointly liable, as the agreement was antecedent to the purchase of the goods, although the creditor did not appear as a joint purchaser at the time of the purchase (c): but if the goods had been first purchased, and the respective parties had entered into a subsequent agreement of the above nature, the creditor, whose name did not appear in the purchase, would not have been liable to the seller, though responsible for any subsequent engagement relative to the particular adventure (d); nor would a subsequent acknowledgment of his liability constitute him a partner antecedent to the period when his joint liability commenced. (e)

(a) *Reid v. Hollinshead*, 4 B. & C. 867.

(b) *Hopkinson v. Smith*, 1 Bingh. 13. S. C. 7 B. Moore, 237. See *Taylor v. Glassbrook*, 3 Stark. N. P. C. 75. An agreement with an unqualified person, to assist in the business and share the profits, in lieu of salary, is to be considered a partnership; and its necessary effect being to enable another to practise as an attorney, and to use the name of one for his own account and profit, it was held within the provisions of the 22 G. 2. c. 46. s. 11. *Tench v. Roberts*, 6 Madd. 145. But an agreement by the widow of a deceased attorney with her son, to carry on the business, and to share the profits, during a certain period, for the mixed consideration of the goodwill of the business, the advance of money, and family affection, is neither within the mischief nor the words of the statute. *Candler v. Candler*, *Ibid.* 141.

(c) *Gouthwaite v. Duckworth*, 12 East, 421.

(d) *Id. ibid.* *Saville v. Robertson*, 4 T. R. 720.

(e) *Id. ibid.*

When different persons purchase goods, each on his separate credit, and afterwards join them in one common adventure, of which they are to share the profit and loss, they become partners from the time of making the agreement, but not until the community of interest has taken place. (a) And the executors of a deceased partner, whose names are not added to the trade, but who continue his share of the partnership property in the concern, for the benefit of his infant child, and who, on a division of the profits and loss, carry the same to the account of the infant, and take no part of the profits themselves, are liable as dormant partners, because, by embarking the property in trade in the first instance, they contract a responsibility in a court of law, which their subsequent application of the profits to purposes not of personal benefit cannot vary. (b) Nor can the responsibility attaching upon a participator in the profit be varied or altered by any private arrangement or stipulation. As regards his own individual interest, with reference to himself and his co-partners, he may stipulate and provide for a contracted responsibility; such as, that he is not to be liable for losses, or that he is merely to sustain his own, or to bear only a proportionate amount of the losses; but a stipulation or provision of such a description will not, in any manner, affect or limit his liability to persons dealing with the firm. The covenant or agreement of the partners cannot be binding upon their creditors, but only upon themselves. (c) In questions with third persons, as was remarked by Lord *Eldon* in a recent case (d), no stipulation or secret agreement can protect a party from loss, because the law itself, to the right of receiving the profits of the trade, annexes a responsibility for the losses. Therefore, where two ship agents, at different ports, entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, and the agreement provided, that neither should be answerable for the acts or losses of the other, but each for his own; it was held, that by this agreement they became liable, as partners, to all persons with

(a) *Gouthwaite v. Duckworth*, 12 East, 421. *Saville v. Robertson*, 4 T. R. 770.

(b) *Wightman v. Townroe*, 1 Mau. & Selw. 412. See also *Ex parte Richardson, Buck*, 242, 421. Co. B. L. (7th ed.) 74.

(c) *Waugh v. Carver*, 2 H. Bl. 235. *Lord Craven v. Widdows*, 2 Ch. Ca. 139.

(d) *Ex parte Hamper*, 17 Ves, 412.

whom either contracted in his character of ship agent. (a) And this legal responsibility is not to be measured or computed by the extent of each partner's interest in the concern, since whatever the share of the profits to which he is entitled may be, how great soever the inequality between the stipulated profit he may derive and the loss he will sustain, if subjected to general responsibility, it is immaterial to those who deal with the partnership, notwithstanding that a limited and contracted liability may properly form matter of private regulation amongst the partners themselves. In many parts of *Europe*, partnerships, restrictive as to liability, are admitted, provided the deed or instrument, regulating the co-partnership, be entered on a register kept for that purpose; but the law of *England* is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. (b) As between the members of a firm and the persons having claims upon it, each individual member is answerable, *in solido*, for the amount of the whole of the debts contracted by the partnership, without reference either to the extent of his own separate beneficial interest in the concern, or to any private arrangement or agreement that may exist between himself and his co-partners, stipulating for a restricted responsibility. (c) And upon this principle the members of an unincorporated company or society are liable to third persons, as general partners in the undertaking for which the company or society is formed. (d) Those who have the management are, it is true, answerable to the whole extent of their engagements; but even as between them and the members of the society, each individual member is liable to a contribution for what they may have paid. (e)

A distinction, however, prevails between an interest in the profits themselves, as profits, and the payment of a given sum of money, in proportion to a given *quantum* of the profits, as the

(a) *Waugh v. Carver*, 2 H. Bl. 235.

(b) *Per Lord Loughborough*, *Coope v. Eyre*, 1 H. Bl. 37. In *Ireland*, partners in co-partnerships formed under the anonymous<sup>s</sup> partnership act, 21 & 22 G. 3. c. 46. s. 1, 2. are only liable to the creditors of the concern, to the extent of their respective shares in the co-partnership.

(c) *Rex v. Dodd*, 9 East, 527. *Rice v. Shute*, 5 Burr. 2611. *Abbot v. Smith*, 2 W. Blacks. 947. *Wright v. Hunter*, 1 East, 20. *Doddington v. Hallet*, 1 Ves. sen. 497. *Dict. Park J.*, *Saltoun v. Houstoun*, 1 Bingh. 444.

(d) *Rex v. Dodd*, 9 East, 527. *Per Lord Eldon*, *Carlen v. Drury*, 1 Ves. & Bea. 157., and *Kinder v. Taylor*, MS.

(e) *Carlen v. Drury*, *supra*.



reward of, and as a compensation for, labour and services. For instance, a remuneration made to a traveller or other clerk or agent by a portion of the sums received by or for his master or principal, in lieu of a fixed salary, does not subject the traveller, clerk, or agent, to liability as a partner; such remuneration being merely a mode of payment adopted to increase or secure exertion. So a factor receiving for his commission a per-centage on the amount of the price of the goods sold by him, instead of a certain sum, proportioned to the quantity of the goods sold, does not thereby become a partner. (a) Neither is a person who receives from a trader an agreed sum in respect of goods sold by his recommendation, as one shilling per chaldron on coals or the like, to be considered a partner; for, there, there is no mutuality, such a case resembling a payment made to an agent for procuring orders, and having no distinct reference, in the terms of the agreement, to any particular coals purchased by the coal-merchant for resale, upon which a third person may become a creditor of the coal-merchant. (b) This distinction was noticed with regret by Lord *Eldon* in a recent case (c), in which his lordship expressed himself in the following manner: — “The cases have gone farther to this nicety, upon a distinction so thin, that I cannot state it as established upon due consideration, that if a trader agrees to pay another person for his labour in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves, as profits, he is a partner. It is clearly settled, though I regret it, that if a man stipulates, that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner.” And in a still later case (d), the same very learned lord is reported thus to have observed:—“It is impossible to say, as to third persons they are not partners; the ground being settled, that if a man, as a reward for his labour, chooses to stipulate for an interest in the profits

(a) *Dixon v. Cooper*, 3 Wils. 40.(b) *Cheap v. Cramond*, 4 B. & A. 670.(c) *Ex parte Hamper*, 17 Ves. 404.(d) *Ex parte Rowlandson*, 1 Rose, 89. See also *Ex parte Watson*, 19 Ves. 461.

of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner, and no arrangement between the parties themselves can prevent it." Having alluded to the opinion entertained by Lord *Eldon* of this refined, but known distinction, it will not be improper now to advert to the decisions by which that distinction has been settled and established. In the first case on the subject (*a*), a broker was employed to sell goods, under an agreement that he was to have, for his own profit, whatever he could obtain upon the sales beyond a stated sum, as a reward for his trouble; and it was held, that the broker was not a partner with the owner of the goods, nor did such an agreement constitute a liability in that capacity to third persons. So a sailor, employed in the whale fishery, who is to receive a certain proportion of the profits as wages, is not liable as a partner. (*b*) And an agreement to pay one fifth of the profit or loss of a voyage in lieu of wages, primage, &c. does not constitute a partnership between the captain and sailors. (*c*) So, where (*d*) the proprietor of a lighter agreed with a person who worked the lighter, that, in consideration of working her, the latter should receive one half of the gross earnings for his labour, it was ruled by Lord *Ellenborough*, that such an agreement did not constitute a partnership, it being merely a mode of paying wages for labour; but that it would have been otherwise, had the agreement been that the two were to share the *profits* arising from the working the lighter. The same principle was acted upon in the case of *Wish v. Small* (*e*), where an agreement between two persons for a division of the net profits arising on a sale of cattle was considered as a method adopted by the one for payment to the other of the price of their pasturage. There the proprietor of cattle agreed with a grazier that the cattle should be depastured upon his land, and that, after being fattened, the latter should, as a remuneration, receive one half of what the cattle sold for above a certain sum, which was their estimated value; and it was held by Mr. Baron *Thomson*, that this was merely a mode of paying for the pasture, and that it did not create a partnership between the parties. And Mr. Justice *Holroyd* has held, that an agreement between a broker and a

(*a*) *Benjamin v. Porteus*, 2 H. Bl. 590.

(*b*) *Wilkinson v. Frazier*, 4 Esp. 182.

(*c*) *Mair v. Glennie*, 4 Mau. & Selw. 240.

(*d*) *Dry v. Boswell*, 1 Campb. 329.

(*e*) 1 Campb. 331, *in note*.

third person, that the latter should have one half of the commission, claimable by the former for brokerage, on effecting policies of insurance, did not constitute a partnership, but was a mere subcontract. (a) In another case (b) on this subject, it was determined by the Court of Common Pleas, that an agent who has no interest in the capital, but who is paid by a proportion of the profits of an adventure, has not such an interest in the goods themselves, or the profits specifically, as to render him liable, jointly with the owners, to third persons. Such are the cases establishing that distinction, the existence of which is deplored by the learned and noble lord to whose opinion we have already adverted; a distinction which may justly be opened to the observation, of not having been established "upon due consideration." It does not seem to be perfectly in unison with the principle upon which every person having an actual and determinate interest in the profits is amenable to the joint creditors. Such a person, as we have seen, superinduces a liability, because, by abstracting a portion of the profits, he is depriving the creditors of a part of the fund, which they naturally regard as that out of which their demands are to be discharged. The same reason might, it is apprehended, be assigned with equal force in the case of a person, the wages of whose labour are paid by a sum proportioned to a given *quantum* of the profits. Nominally, indeed, there is a discrepancy between the two cases, but in what the substantial difference consists it is not easy to determine. The distinction, however, has so long prevailed, and has obtained successively the sanction and support of so many learned and enlightened judges, that it would be presumptuous to canvass or question its propriety.

A retiring partner, who receives an annuity fairly proportioned to the interest he possessed in the profits and the good will, at the time of his secession from the partnership, is absolved from continued responsibility to third persons (c), provided the fact of his retirement is sufficiently promulgated to the world. (d) From the judgment of Lord Ch. J. *Eyre* in a celebrated case (e),

(a) *Gibbons v. Wilcox*, 2 Stark. N. P. C. 45. And see *Muirhead v. Salter*, cited 4 B. & A. 667.

(b) *Meyer v. Sharpe*, 5 Taunt. 74.

(c) *Young v. Axtell*, cited in *Wagh v. Carver*, 2 H. Bl. 242.

(d) *Parkin v. Carruthers*, 3 Esp. N. P. C. 248. *Gorham v. Thompson*, Peake's N. P. C. 42. *Goode v. Harrison*, 5 B. & A. 157.

(e) *Wagh v. Carver*, *supra*.



it seems that great Judge, at one time, entertained a doubt upon this question ; but that doubt was, according to his own statement, afterwards completely removed. His lordship is reported thus to have expressed himself:—" This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt ; which was, whether, by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy ? But I think this case will not lead to that consequence." However, notwithstanding a fair equivalent annual payment, in lieu of the interest actually existing in a partner at the time of his withdrawing himself from the firm, will not render him liable to demands against the partnership, on the ground of the benefit he derives ; yet if he still continue to participate in the profits, the mere circumstance of his having withdrawn his name will not protect him from responsibility. Such a person, although virtually and apparently he has renounced the partnership, continues to possess an actual and beneficial interest in it and its profits, in the character of dormant partner, and consequently cannot avail himself of his nominal retirement, as affording him an exemption from continued liability. (a) And to discharge him in the capacity of annuitant simply, the profits of the trade must only be relied upon, as a fund for payment of the annuity (b), which, to have the effect of exoneration, must be certain and defined. If it be casual, indefinite, and depending on the accidents of trade, the original liability is not extinguished, because there is not a complete extinction of interest in the profits. (c) Therefore (d), where a partnership for seven years was terminated at the end of one year, and the partner continuing in the business gave to the retiring partner a bond for the capital which the latter brought into the trade, with legal interest, and agreed to give him an annuity of two hundred pounds for six years, if the remaining partner so long lived, as and in lieu of his share of the profits, and the retiring partner was to have at

(a) *Grace v. Smith*, 2 Blacks. 998. *Leveck v. Shaftoe*, 2 Esp. N. P. C. 468.

(b) *Per De Grey C. J.*, *Grace v. Smith*, *supra*.

(c) *Per Blackstone J.*, *Id.* *ibid.* *Young v. Axtell*, cited 2 H. Bl. 242.

(d) *Bloxham v. Pell*, cited in *Grace v. Smith*, *supra*.

all times an undisturbed right of inspecting the books; it was held by Lord *Mansfield* that this continued his connection as a partner; the annuity being casual, as depending on the life of the grantor, and the liberty to inspect the books, which was reserved to the seceding partner, being in fact the right of a partner, and evincing that he was not wholly uninterested in the profits. And where a retiring partner assigned all his interest in the concern to two of the continuing partners, upon trust to pay him an annuity for his life, subject to abatement or enlargement with the fluctuation of the profits of the trade, Lord *Eldon* held that the partnership, with reference to creditors, was not determined. (a) Even a reservation by a retiring partner of a contingent interest in the concern will, it seems, prevent the effectual determination of the partnership, *quoad* third persons. Thus, where a father, on retiring from business, assigned all his share in the concern to his co-partners upon trust for his infant children, in such shares as he should appoint, and in default of appointment upon trust for the children, to be divided amongst them when the youngest should attain the age of majority, it was held that the contingent interest the father had in the share so assigned, depending upon the death of any of the children under age, was such an interest reserved by him in the concern, as, with respect to creditors, prevented the determination of the partnership. (b) The original responsibility would likewise exist where the retiring partner is not only to receive an annuity, but likewise a per-centage upon all sales to old customers, and to new customers by him recommended. (c) But where a partner declining business allows his capital to remain in the hands of his co-partner at legal interest, and he is to receive in addition a stipulated annuity for a stated term of years, it does not operate as a continuance of the partnership. This question was agitated in a leading case on this subject (d), in which the jury found that a loan, upon such terms, did not create a secret constructive partnership; and the Court, on application being made to it for the purpose, refused to disturb the verdict.

Having seen in what cases a dormant partner contracts, and an outgoing partner continues his responsibility to third persons, we will now consider what renders a party answerable to creditors

(a) *In re Colbeck*, Buck. 48.

(c) *Young v. Axtell*, *supra*.

(b) *Id. ibid.*

(d) *Grace v. Smith*, 2 Blacks. 998.

in the capacity of a nominal partner. In the instances which have already been reviewed, the responsibility incurred by the parties is either wholly, or partially, counterbalanced, when it is enforced, by the right of participation in the profit. However, to fix upon a person the character of partner, and to burden him with its consequences, it is not necessarily essential that he should derive any profit or advantage from the concern; if he have an apparent interest it is sufficient, although he does not reap any actual benefit. A man may contract the liability of, and be sued as, a partner, who never was in reality a partner. (a) For instance, a person who is not interested in the capital embarked in the trade or in its profits may be responsible as a partner, if, by lending his name, he hold himself out to the world as being a partner. (b) So, a person who retires from a house of trade, and suffers his name to continue in the firm after he has ceased to be an actual partner, is liable to the world as a partner, although the property belongs entirely to other persons. (c) And the manager or servant of a partnership concern, who acts as one of the partners in the partnership, stands in the relation of a partner with respect to third persons. (d) It is the permitted use of the name which makes such a person liable, as one of those by and to whom every thing is bought and sold. (e) The principle upon which persons suffering their names to be used as partners subject themselves to responsibility has been ably stated by Lord Ch. J. *Eyre*, in his judgment on a case which we have already had occasion frequently to notice. (g) "Now a case," said that learned Judge, "may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But, if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the grounds of the real transaction between them, but upon principles of general

(a) *Per Abbott C. J.*, *Goode v. Harrison*, 5 B. & A. 156. *Bourne v. Freeth*, 9 B. & C. 639.

(b) *Per Lord Eldon*, *Ex parte Langdale*, 18 Ves. 301. *Young v. Axtell*, cited 2 H. Bl. 242. *Guidon v. Robson*, 2 Campb. 302. *Parsons v. Crosby*, 5 Esp. N.P.C. 199. *M'Iver v. Humble*, 16 East, 174.

(c) *Per Best J.*, *Smith v. Watson*, 2 B. & C. 411.

(d) *Geddes v. Wallace*, 2 Bligh, 270.

(e) *Ex parte Watson*, 19 Ves. 461.

(g) *Waugh v. Carver*, 2 H. Bl. 235.



policy, to prevent the frauds to which creditors would be liable, if they were to suppose they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." The liability of nominal partners results solely from their holding themselves out as partners, or suffering their names to be used as members of the firm; and as they thereby give a false appearance of substance to the concern, it is but equitable that they should make it good. Therefore, where parties are not in point of fact partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, both are to be considered and treated as partners. (a) And to create responsibility as a nominal partner, the allowed use of the name on bills of parcels used by the firm seems to be sufficient (b), notwithstanding that the creditor was originally ignorant of the introduction of the name. (c) In a late case (d), in which one person, for the purpose of counteracting a report that a partnership existed between him and another, caused an advertisement to be inserted in the Gazette, notifying a dissolution, Lord Eldon refused to decide the question of partnership, but directed an issue to try it. However, to render a person responsible as a nominal partner, positive consent, or at least a knowledge by him of the assumption of his name, from which his acquiescence will be inferred, must be shown. (e) Without actual concurrence or passive privity, which conclusively affords a presumption of acquiescence, he does not become a partner in the fraud practised upon the creditors by the improper use of his name, and he cannot therefore be made to suffer for the acts of others of which he is not conscious, and to which he is not privy. On this principle it has been held (g), that the unauthorised use of the name of a seceding partner, after ample notice has been given of his having withdrawn from the partnership, does not induce an obligation upon him to fulfil contracts im-

(a) *Per Lord Kenyon*, *De Berkum v. Smith*, 1 Esp. N. P. C. 29.

(b) *Young v. Axtell*, *supra*. (c) *Id. ibid.*

(d) *Ex parte Matthews*, 3 Ves. & Bea. 125. (e) *Guidon v. Robson*, Campb. 302.

(g) *Newsome v. Coles*, 2 Campb. 617. But where the retiring partner suffered his name to remain over the door, he was held liable to a *bonâ fide* holder of a bill of exchange drawn after the dissolution. *Williams v. Keats*, 2 Stark. N. P. C. 290. And where a retiring partner, in the business of carriers, permitted his name to remain on the cart, and over the house of business, he was held responsible for the negligence of the driver. *Stables v. Eley*, 1 C. & P. 614.

properly entered into by the old firm in his name, jointly with their own, because it is not essential to his protection that he should apply to a court of equity for an injunction to restrain the remaining partners from using the style of the old firm. And it has been decided that a man cannot be liable as a partner, where there has not either been a contract between him and the ostensible person to share jointly in the profits and loss, nor has he permitted the other to make use of his credit, and to hold him out as one jointly liable. (a) It remains to be observed, that persons, who appear to the world as partners, may not only lawfully stipulate among themselves that some of them shall not participate in the profit and loss, and therefore shall not contract the liability of partners, but it seems that those, who are excluded from participation, will not be responsible, in the character of partners, to such claimants upon the firm as are apprized of the stipulation. (b)

Where a contract is entered into by parties, which, in its nature and conditions, is immoral, or in violation of the general laws of public policy, such as being affected by usury, it does not amount to a partnership contract within the legal principles established respecting joint traders, and the parties themselves are not legally bound by it. For instance, an agreement purporting to be, or assuming the shape of a partnership in trade, contracted for a single dealing, according to which one of the partners advanced a sum of money for the purchase of particular goods, stipulating at the same time to have *one half of the profits* upon a resale of such goods, which profits exceeded five per cent., and the *principal sum lent* was not risked, was held to be unconscionable, and consequently not binding. (c) So, if the borrower of money give a bond for the principal and interest at five per cent., and, at the same time, covenant to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with others, this is a usurious contract, and the obligee cannot recover upon the bond; for, in such an agreement, provision being made to receive the profits only, and not to engage for the losses of a trade, it is contrary to the principle upon which the partnership contract must be founded, namely, reciprocal risks and advantages, and must, consequently, it has been said, be deemed a contract not

(a) Hoare v. Dawes, Dougl. 371.

(b) Alderson v. Pope, 1 Campb. 408.

(c) Jestons v. Brooke, Cowp. 793.

having operation between the parties. (a) If, however, a *bonâ fide* partnership is entered into, an advance of money, on whatever terms, in order to carry on the business, cannot be considered as a loan; and if there be not a loan the contract is not affected by usury. Therefore, where A and B by deed covenanted to become partners as army clothiers, for ten years, and that A should advance 20,000*l.* as part of the capital for carrying on the business, and that B should find a like sum; that A during the continuance of the partnership, should have out of the profits, if sufficient, or, if not, out of the capital, 2000*l.* yearly for his share of the profits. B then covenanted that, on the determination of the partnership by effusion of time, the sum of 20,000*l.* should be repaid to A, and that B should guarantee all debts and pay all losses. In an action brought upon

(a) *Morse v. Wilson*, 4 T. R. 353. In this case it was insisted for the plaintiff, that although as between him and the partners he was not under any liability, yet to all the rest of the world he was, by the general rules of law, responsible for the partnership engagements, and as the principal of his debt was thereby put in hazard, the contract was not usurious. But Lord *Kenyon* and Mr. *J. Buller* were of opinion that, as the plaintiff could only be liable to the joint creditors in the event of the insolvency of the partners, the principal was no farther hazarded than in the case of every other loan, the repayment of which must depend upon the solvency of the borrower. However, in the late case of *Fereday v. Hordern*, 1 Jacob, 144., Lord *Eldon* determined, that where the lender of money assumes, in respect of the loan, the character of a partner to third persons, the security given for the loan is not invalidated on the ground of usury, although the benefit reserved exceed the legal rate of interest, and the lender expressly stipulates for an indemnity against losses. There A, B, and C, partners in trade, in consideration of 4000*l.* paid to them by D in augmentation of their capital, agreed by deed to admit him into partnership with them for a term. It was covenanted that D should receive, in lieu of profits, a clear sum of 550*l. per annum*, and all the property of the concern was charged with the payment of this sum quarterly, and of the 4000*l.* at the determination of the partnership. A, B, and C, were to pay rent, taxes, wages, and the other outgoings of the trade, which was to be carried on by them, and in their names only, and D was not to be required to attend to it. D was at liberty to retire on giving twelve months' notice; and on his retiring, or at the end of the term, the 4000*l.*, and the arrears (if any) of the 550*l. per annum*, were to be paid to him by A, B, and C, by instalments to be secured by their bonds, and they were to indemnify him from the debts of the partnership. On a bill being filed, praying that the deed might be delivered up to be cancelled on the ground of its being usurious, the Lord *Chancellor* observed, that though D was not under any liability as between himself and A, B, and C, yet as he was liable for the debts of the concern to all the rest of the world, it was impossible to make out that the deed was usurious. It appears to be difficult to reconcile this latter decision with that of *Morse v. Wilson*. See also *Anderson v. Maltby*, 2 Ves. jun. 248. S. C. 4 Bro. C. C. 423. In *Enderby v. Gilpin*, 5 B. Moore, 571., *Park J.*, in adverting to the case of *Morse v. Wilson*, seems to have thought that a person could not be a *partner* to strangers, and a *lender* to the firm.



the deed to recover the 20,000*l.* at the expiration of the ten years, B pleaded that the deed was executed by way of shift, in pursuance of an usurious agreement; but that plea, upon issue joined, being negatived by the verdict of a jury, the Court of Common Pleas, and afterwards the Court of King's Bench, on error, held, that, after that finding, the deed must be taken to disclose the real intention of the parties, and that it was not, therefore, void upon the ground of usury. (a) And if the lender agree to share the losses of the concern, a loan for more than five per cent. has been held not to be usurious, on the ground that a partnership is established between the parties. (b)

Although the general right which any number of individuals possess, of associating themselves together for the purpose of carrying on any lawful trade or business, is unquestionable, yet restraints have, in various instances, been imposed by the legislature upon such a right. In the business of bankers, for the purpose of securing to the *Bank of England* exclusively the privilege of banking, it has been declared by the *Bank acts* (c)

(a) *Enderby v. Gilpin*, 5 B. Moore, 571. S. C. 5 Barn. & Ald. 954.

(b) *Morrisset v. King*, 2 Burr. 891.

(c) 6 Ann. c. 22. s. 9. 7 Ann. c. 7. s. 61. 3 Geo. 1. c. 8. s. 44. 15 Geo. 2. c. 13. s. 5. 21 Geo. 3. c. 60. s. 12. 39 & 40 Geo. 3. c. 28. By the 7 Geo. 4. c. 46. it is enacted, that it shall and may be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or co-partnership, although such persons so united or carrying on business together shall consist of more than six in number, to carry on the trade or business of bankers in *England*, in like manner as co-partnerships of bankers consisting of not more than six persons in number may lawfully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in *England* exceeding the distance of sixty-five miles from *London*, payable on demand, or otherwise, at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from *London*, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid: provided, that such corporations, or persons carrying on such trade or business of bankers in co-partnership, shall not have any house of business or establishment as bankers in *London*, or at any place or places not exceeding the distance of sixty-five miles from *London*; and that every member of any such corporation or co-partnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or co-partnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or co-partnership, or while any sum of money on any

to be unlawful for any body corporate, or for any other persons in covenants or partnership in *England*, consisting of more than six persons, except the *Bank of England*, to borrow, owe, or take up any sum of money on their bills or notes payable on demand, or at any less time than six months from the time of borrowing. In a recent case, where a partner in a banking house in *Scotland*, consisting of more than six persons, opened an office in *England* as agent of the *Scotch* house, and issued their notes payable on demand, it was held to be a clear violation of the *Bank* acts. (a) And in expounding these statutes, it has been ruled, that a promissory note, issued by a commercial company consisting of more than six persons, who are not bankers, is not within the prohibition. (b) But a corporation, not established for trading purposes, cannot become acceptors of a bill of exchange payable at a less period than six months from its date, such a case being a direct infringement on the rights of the *Bank of England* (c); unless, indeed, the act of parliament by which the corporation is created expressly authorises and empowers it to become a party to negotiable securities. (d) And even in the latter case, if the corporation is empowered to raise money by notes for a special purpose only, yet if it issue notes at less than six months' date, without stating therein that they were given for that purpose, the corporation may resist payment, on the ground that they were given for another purpose; and this will be a defence even against an innocent indorsee. (e) And with the view of sup-

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bills or notes is owing or unpaid, or at the time the same became due from the corporation or co-partnership; any agreement, covenant, or contract to the contrary notwithstanding. The 20th section provides, that nothing in the act contained shall extend or be construed to extend to prejudice, alter, or affect any of the rights, powers, or privileges of the Governor and Company of the *Bank of England*, except as the exclusive privilege of the said Governor and Company is by the act specially altered and varied.

(a) *Ex parte Randleson*, 1 Mont. & M. 86.

(b) *Wigan v. Fowler*, 1 Stark. N. P. C. 459.

(c) *Broughton v. Proprietors of Manchester and Salford Water Works*, 3 Barn. & Ald. 1. In *Magor v. Hammond*, which was a special verdict argued before the twelve Judges, it is stated by *Bayley J.* to have been decided, that the several acts made for the protection of the *Bank of England* did not prevent more than six persons from paying their debts by their acceptance, but merely prevented more than that number carrying on a banking concern. 9 Barn. & Cress. 363.

(d) *Slark v. Highgate Archway Company*, 5 Taunt. 792. *Murray v. East India Company*, 5 Barn. & Ald. 204.

(e) *Slark v. Highgate Archway Company*, *supra*.

pressing societies amongst coal buyers, and thereby of keeping the coal trade open and free, a partnership composed of more than five persons for the purchasing of coals for sale, or for making regulations with respect to the manner of carrying on the trade, is, by a legislative provision (*a*), rendered illegal, and is to be deemed an unlawful combination to advance the price of that article, for which the parties concerned are punishable by indictment or information. And formerly, in the case of marine insurances, the right of jointly assuring any ship or goods at or going to sea was prohibited (*b*), (except in the instances of the *Royal Exchange* and *London Assurance Companies*, upon whom, in consideration of a compensation made by them to the public, an exclusive monopoly in this respect was conferred,) and the policies of assurance effected by underwriters having a joint interest, were not only declared to be *ipso facto* void, but every sum underwritten was forfeited in equal moieties, one to the king, the other to the informer. So, in favour of the same Insurance Companies, a joint loan of money upon bottomry by any other than those Companies, or by any society or partnership, was interdicted, and the security given upon such a loan was declared to be *ipso facto* void, and the lenders were subjected to the same penalties as are inflicted in cases of usury. (*c*) But these prohibitions are now relaxed; the legislature, to destroy the monopoly thereby created, and to allow assurances to be effected on the principle of a free trade, having enacted that so much of the prohibitory statute as restrained any corporation, society, or partnership, from granting, signing, and underwriting any policy of assurance, or making any contract for assurance, of or upon any ship or goods at sea, or going to sea, or from lending money by way of bottomry, or as made any such contract void, or declared that the same should be adjudged usurious, or as imposed any forfeiture or penalty in respect of any such policy or contract, should be repealed. (*d*) Besides in

(*a*) 28 G. 3. c. 53. s. 2.

(*b*) 6 G. 1. c. 18. s. 12. The cases which arose upon this branch of the statute are *Lees v. Smith*, 7 T. R. 338. *Harrison v. Millar*, Ibid. 340. n. S. C. 1 Esp. N. P. C. 513. *Reed v. Cole*, 3 Burr. 1512. *Branton v. Taddy*, 1 Taunt. 6. *Cockburn v. Thompson*, 16 Ves. 328. *Dowell v. Moon*, 4 Campb. 166.

(*c*) See 6 G. 1. c. 18. s. 12.; and *Everth v. Blackburne*, 2 Stark. N. P. C. 66. S. C. 6 Mau. & Selw. 152.

(*d*) See 5 G. 4. c. 114. s. 1.



the instances we have enumerated, the legislature, in the year 1720, in consequence of the multiplicity of wild schemes which were then formed, found it necessary to interfere to secure the public against the ruinous consequences of projects, where great hopes are held out on false foundations; and an act of parliament was passed (*a*), which had for its object the preventing combinations of speculating individuals, who, without the authority of an act of parliament, or the king's charter of incorporation, and by means of delusive schemes, might engross the public attention, and entail upon the unwary all the mischief which gaming and rash speculation are calculated to produce. In this respect, however, the law is now altered, the legislature having, on principles of policy, repealed so much of the act alluded to as related to the undertakings, attempts, and practices thereby denounced, judging it more expedient to leave such matters to the cognizance of the common law. (*b*)

(*a*) 6 G. 1. c. 18. s. 18. The different projects to which the attention of the legislature was called at the time this act of parliament was passed, are detailed in the 19th vol. of the Commons' Journals, p. 341.

(*b*) See 6 G. 4. c. 91. The reader is referred to the following list of cases as elucidatory of the construction put upon the statute:—*Rex v. Cawood*, 2 Ld. Raym. 1361. S. C. 1 Stra. 472. *Rex v. Dodd*, 9 East, 516. *Buck v. Buck*, 1 Campb. 547. *Stent v. Bailis*, 2 P. Wms. 217. *Rex v. Stratton*, 1 Campb. 549. *n.* *Rex v. Webb*, 14 East, 406. *Pratt v. Hutchinson*, 15 East, 515. *Ellison v. Bignold*, 2 Jac. & Walk. 503. *Davis v. Fisk*, in Appendix to Farren's Treatise on Life Ass. p. 128. *Brown v. Holt*, 4 Taunt. 587. *Child v. Hudson's Bay Company*, 2 P. Wms. 207. *Josephs v. Pebrer*, 3 B. & C. 639.

## CHAPTER II.

## SECTION I.

*The Interest of Partners in Stock in Trade.*

HAVING considered the nature of a partnership, the various ways by which the relation of partners may be contracted, and in what instances it is prohibited, we will now proceed to inquire what interest partners have, by law, in the goods or capital they contribute at the outset, or acquire in the course of trade.

Partners are, at law, joint tenants of their merchandise; not only of that particular part which was brought into the partnership at the time of its formation, but they continue so throughout their co-partnership dealings, whatever changes or additions may be made to it in the course of trade. (a) The joint tenancy, created by the contract of partnership, differs, however, in one of its chief characteristics, from an ordinary joint tenancy, because as between partners there is no *jus accrescendi*, or right of survivorship, a quality which, being appended to a possession *per my et per tout*, at common law, always accompanies a joint tenancy. The absence of this distinguishing feature of a joint tenancy is noticed by Lord Coke, in commenting upon a passage of *Littleton*, in which it is laid down, that the right of survivorship exists between joint tenants. That able commentator says (b), “an exception is to be made of two joint merchants; for the wares, merchandises, debts or duties that they have, as joint merchants or partners, shall not survive, but shall go to the executors of him that deceaseth; and this is *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*.” Even where two persons, by testamentary disposition, take, as joint tenants, leasehold and personal estate

(a) *West v. Skip*, 1 Ves. 242. S. C. 2 Swanst. 586. (b) *Co. Litt.* 182. a.

embarked in trade, and there is no express severance of the joint tenancy, yet if they continue to deal as partners for a length of time, a severance between themselves will be implied, and survivorship will not hold. (a) This denial to the survivor of any benefit arising from survivorship is a maxim of *lex mercatoria*, of which the courts will take notice without its being specially pleaded. (b) It has been said (c) that partners are either tenants in common of the partnership effects, or joint tenants without benefit of survivorship; but it would seem, that, strictly speaking, partners are rather to be considered as falling within the latter denomination. (d) Each partner is possessed *per my et per tout*, that is, by the *half* or *moiety* and by *all*, or, in other words, each has a joint interest in the whole, but not a separate interest in any particular part of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a unity, or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not; but their several degrees of interest must be regulated according to the stipulated proportions, and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no *exclusive right* to any part of the joint effects, until a balance of accounts be struck between him and his co-partners, and it be ascertained precisely what is the actual amount of his interest. (e)

Besides the purchase of joint stock, partners are sometimes obliged to invest part of their capital in *real property*; for it very frequently happens, that joint undertakings require the possession of lands or houses, in order to carry on the intended trade or speculation. Wherever that is the case, and the lands or houses purchased with the joint capital are held for the pur-

(a) *Jackson v. Jackson*, 9 Ves. 591. S. C. 7 Ves. 535.

(b) *Bellasis v. Hester*, 1 Ld. Raym. 281.

(c) Wats. on Part. 65.; and see 2 Brownl. 99.

(d) Abbott on Ship. 94. Com. Dig. tit. Merchant, D. 3. Bac. Abr. tit. Joint Tenants and Tenants in Common, C. 2 Beawes, 99. *Annand v. Honiwood*, Cas. in Chan. 129. It seems that the owners of a ship are not interested in it as joint tenants, but as tenants in common. *Ex parte Harrison*, 2 Rose, 76.

(e) *Fox v. Hanbury*, Cowp. 445. *Smith v. De Silva*, Ibid. 469. *West v. Skip*, 1 Ves. jun. 242. S. C. 2 Swanst. 586. *Lingen v. Simpson*, 1 Sim. & Stu. 600.



pose of, and as the *substratum* for, the partnership concern, the partners are in reality, and to all beneficial intents, tenants in common thereof, without regard to the form of the conveyance, the individual to whom it is made, or the length of time for which the interest is to endure. Courts of law, it is true, must look to the legal estate; they will consider the survivor of two joint-tenants as, invariably, entitled to the whole by survivorship; and if lands are conveyed to one of several partners, they will invest him with all the rights of a tenant in severalty, excluding from their attention the funds from which the lands were bought, and the object of the purchase. But courts of equity, unfettered by technical rules, seek to effectuate the intention of the parties, and are guided by the justice of each particular case: they, consequently, conceive, that there is a tenancy in common between partners of real property, and they decree the person in whom the legal estate vests to be a trustee for those beneficially interested. In equity, therefore, real estates, bought by a commercial partnership, for the purpose of the partnership concern, are to be considered as forming a part of the partnership fund. (a) Thus, where five persons purchased a tract of ground, with the intention of draining it, and the conveyance was to them as joint-tenants in fee, but they contributed rateably to the purchase, they were held to be tenants in common in equity; and though one of the five undertakers deserted the partnership for thirty years, yet he was afterwards admitted on such terms as would place the others on a footing of equality with him. (b) So if a person becomes, by his acts, a partner, in a colliery, for instance, in which land is necessary to carry on the trade, the interest in a lease will pass, by operation of law, as an incident to the trade, without being affected by the statute of frauds; and if one of the partners take a lease of the colliery in his own name, he will be deemed to take and hold the premises for himself and his co-partners in equal shares. (c) On the same principle, if the lease of the premises, where the joint trade is carried on, be renewed by one partner, in his own name, clandestinely, it is a

(a) *Thornton v. Dixon*, 3 Bro. C. C. 199. *Per Lord Eldon*, *Crawshay v. Maule*, 1 Swanst. 508, 521. See also Sugd. on Vend. and Purch. (5th ed.) 522.

(b) *Lake v. Craddock*, 3 P. Wms. 158. S. C. 1 Eq. Ca. Abr. 291. pl. 3. And see what is said by Lord *Hardwicke* in *Rigden v. Vallier*, 2 Ves. 258. S. C. 3 Atk. 731.

(c) *Foster v. Hale*, 3 Ves. 696. S. C. 5 Ves. 308.

trust for the partnership, and is to be accounted for as partnership property. (a) And where real estates are purchased with the partnership funds, but conveyed only to one partner, they are, nevertheless, partnership property. But if estates are purchased out of the partnership fund, and conveyed to one partner under a specific agreement that the estates shall be his, and he shall be debtor for the money, the estates are his separate property. And a provision having been made for the wife of such purchaser previous to the marriage, and at that time an infant, in bar of dower, thirds, and all claim upon the real and personal estate of her husband, which in its nature was precarious and uncertain, she was held entitled to dower against the assignees under a joint commission against the partners. (b) When it is doubtful whether the purchasers bought the property to carry on trade, an inquiry will be directed before the master to ascertain the fact. (c)

But although, during the lives of the partners, freehold estates, purchased by a commercial partnership, as an article of stock, are considered as forming a portion of the joint fund, yet, on the death of any of the partners, it does not appear clearly established, whether they pass as real estate, or as stock, although, according to modern decisions, it may, perhaps, be considered as settled, that the right of survivorship does not exist even in such a case. (d) Formerly, indeed, it was held, that lands, purchased for the purpose of a partnership concern, were in all respects a portion of the partnership fund, and were therefore distributable as personal property. (e) And this doctrine seems more consonant to natural equity; for if the *jus accrescendi* were allowed to operate with regard to real property, it might happen that the partner, indebted to the partnership for his

(a) *Featherstonhaugh v. Fenwick*, 17 Ves. 298. See also *Burroughs v. Elton*, 11 Ves. 29. Where a partner, since deceased, contracted in his own name for a lease of premises to be employed in the partnership trade, Lord *Eldon* refused to restrain the landlord from granting a lease to his representatives, on the ground that the contract was made with him alone, but he restrained the representatives from disposing of the lease, when granted, except for partnership purposes, and with the assent of the surviving partner. *Alder v. Fouracre*, 3 Swanst. 489.

(b) *Smith v. Smith*, 5 Ves. 189. And see *Ex parte Emly*, 1 Rose, 64.

(c) 1 Ves. jun. 435.

(d) See Mr. *Eden's* note to *Thornton v. Dixon*, 3 Bro. C. C. 200.

(e) *Jefferys v. Small*, 1 Vern. 217. *Lake v. Craddock*, *supra*. See, also, *Elliot v. Brown*, 1 Vern. 217. S. C. 3 Swanst. 489. *n.* and cited by Lord *Eldon*, 9 Ves. 597.

proportion of the purchase money, would succeed to the whole, while the representatives of the deceased partner, who advanced the money, would, by his death, be deprived of the benefit he intended should result from the purchase. (a) However, Lord *Thurlow*, determined (b), that, although a copartnership agreement might alter the nature of real property (c), it must be express to do so; and that if the intention of the parties, that such a conversion should take place, be not sufficiently manifested, the houses and lands they hold and use in the trade will descend according to the rules of the common law. Nor does this determination stand unsupported; a succeeding, and a most eminent judge, has considered himself bound by his authority. In two cases (d) which came before the late learned Master of the Rolls (Sir *W. Grant*), he recognised and acted upon the decision of Lord *Thurlow*, considering the question as concluded by it. But notwithstanding the respect due to judicial opinions delivered by judges of such celebrity, it seems that the principle on which they are founded is at present very doubtful, if not expressly overruled. In the case of *Townsend v. Devaynes* (e) Lord *Eldon* decided, that the freehold of premises, purchased by partners, for the purpose of carrying on the business in which they are engaged, is, on the death of one partner, to be considered as personal estate. The same noble and learned lord is, in another case (g), represented to have stated it as his opinion, that all property involved in a partnership concern ought to be considered as personal. And the opinion entertained by gentlemen of the first professional eminence is, that where real estate has been purchased with partnership property, for the use of the partnership, it becomes personal property, not only as between the members of the partnership respectively, and as between the partnership and creditors, but also as between the representatives of a deceased and the surviving partner. (h)

(a) *Lake v. Craddock*, *supra*.

(b) *Thornton v. Dixon*, *supra*. See, also, *Stuart v. Marquis of Bute*, 11 Ves. 665, 6.

(c) See *Ripley v. Waterworth*, 7 Vesey, 425.

(d) *Bell v. Phyn*, 7 Vesey, 453. *Balmain v. Shore*, 9 Vesey, 500.

(e) *Mont. on Partn.* in notes, p. 97.

(g) *Selkrig v. Davies*, 2 Dow. P.C. 242. See, also, *Crawshay v. Maule*, 1 Swanst. 508. 521.

(h) *Thornton v. Dixon*, *supra*.



## SECTION II.

*Of Acts by which one Partner may bind the Firm.*

THE object of our last inquiry was to ascertain what interest partners respectively possessed in the joint personal stock, and in real property acquired through the medium of the partnership funds: we will now endeavour to explain by what acts one partner may, in commercial transactions, bind the firm. It has been well observed (*a*), that the transactions of partners, in which they all severally and respectively join, differ in nothing, in respect to legal consequences, from transactions in which they are concerned individually. We are here, however, chiefly to consider in what instances, by virtue of the relation subsisting between them, the act of one shall be construed as the act of all. It may be laid down, that partners are bound universally by what is done by each other in the course of the partnership business. Their liability, under contracts, is commensurate and co-extensive with their rights. Although the general rule of law is, that no one is liable upon any contract, except such as are privy to it; yet this is not contravened by the liability of partners, since they may be imagined virtually present at, and sanctioning the proceedings they singly enter into in the course of trade; or as each vested with a power, enabling him to act at once as a principal, and as the authorised agent of his copartners. By entering into the partnership, each party reposes confidence in the other, and constitutes him his general agent, as to all the partnership concerns; and it would be a great impediment to commerce, if, in the ordinary transactions of their trade, it were necessary that the actual consent of each partner should be obtained, or that it should be ascertained that the transaction was really for the benefit of the firm; hence the act of one, when it has the appearance of being on behalf of the firm, is considered as the act of the rest. It is for the advantage of partners themselves, that they are thus held liable; as the credit of their

(*a*) See Wats. on Partn. 167.

firm in the mercantile world is hereby greatly enhanced, and a vast facility is given to all their dealings; insomuch, that they may reside in distant parts of the country, or in different quarters of the globe. A due regard to the interests of strangers is, at the same time, observed; for where a merchant deals with one of several partners; he relies upon the credit of the whole partnership, and therefore ought to have his remedy against all the individuals who compose it.

It is a clear and undeniable proposition of law, that one partner may, by his own acts, bind his copartners in all transactions relating to the partnership. (a) The power of an individual partner, by his separate act, thus to induce a joint responsibility, is not confined, simply, to the drawing or accepting a negotiable instrument, which species of engagement, according to the present course of mercantile dealings, is of frequent occurrence, but the members of a firm will be bound by any contract or engagement into which any single partner may enter, provided the contract or engagement itself has a reference to the partnership. In a case that arose in the reign of Queen *Anne* (b), it was held, by Lord Ch. J. *Holt*, that if one member of a firm of bankers receive a sum of money to purchase a ticket in the lottery, and undertake to pay the benefit arising from it, the other members are liable if the ticket, when purchased, be drawn a prize. So a partner, whilst employed in transacting the partnership business, may borrow money for the purpose of defraying his expenses, and it will be a charge upon the whole firm. (c) In fact, whatever be the nature of the contract, there is no doubt but that the act of every single partner, in a transaction relating to the partnership, binds all the others. (d) And the act or assurance of one partner, made with reference to business transacted by the firm, will bind all the partners, even although it be out of the regular course, and be contrary to an express arrangement amongst themselves, because it is within the scope of his authority. To illustrate this position, a case may be put where two persons, in partnership for the sale of horses, agree between themselves never to warrant any horse; yet, though this be their

(a) *Harrison v. Jackson*, 7 T. R. 207.

(b) ——— *v. Layfield*, 1 Salk. 292. S. C. Holt's Rep. 434.

(c) *Rothwell v. Humphreys*, 1 Esp. N. P. C. 406.

(d) *Per Lord Mansfield*, *Hope v. Cust*, cited 1 East, 48. *Swan v. Steele*, 7 East,

course of business, it is clear that if upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound, because the public cannot be supposed cognizant of their private arrangements. (a) But the implied authority of one partner to bind another is generally limited to such acts as are, in their nature, essential to the general object of the partnership. Indeed, an authority in one partner to bind the firm will not be implied, except in matters which are necessary to carry on the trade in which the partners have embarked. (b) Therefore it has been decided that a joint interest in and occupation of a farm by two persons is not a partnership, so as to convey to each an implied authority to bind the other by the acceptance of bills of exchange for payments in respect of the farm. As, where *A.* and *B.* agreed with *C.* to take a farm, and to pay for the stock, &c. at a valuation, by bills at three months, and *B.* becoming subsequently unable to attend to the business, *A.* and *C.* without the knowledge or consent of *B.*, entered into a new agreement to pay part in cash, and the remainder by bills at six and twelve months, which *A.* accepted for himself and *B.*, it was held that *B.* having never ratified the giving such bills by *A.*, the mere joint occupation of the farm by himself and *A.* could not operate by relation so as to render the bills binding on him contrary to the terms of the original contract, and without his assent. (c) We will, in the first place, consider in what cases one partner is invested by law with the power of binding his copartners, by the making, the drawing, the indorsing, or the accepting of promissory notes or bills of exchange, and, at the same time, we will point out the instances in which that authority is denied to him.

The power of one partner to bind the firm in partnership transactions, by the making of *promissory notes*, or the drawing, accepting, or indorsing of *bills of exchange*, has never been disputed. (d) It is within the scope of a trading partner's general authority so to act, without the necessity of the creditors inquiring whether the particular partner had such an authority expressly delegated to him. This was so settled in the reign of

(a) *Per Abbot C. J.*, *Sandilands v. Marsh*, 2 B. & A. 679. And see *Fenn v. Harrison*, 3 T. R. 760.

(b) *Per Best C. J.*, *Stead v. Salt*, 3 Bingh. 103. *Bourne v. Freeth*, 9 B. & C. 641.

(c) *Greenlade v. Dower*, 7 B. & C. 635. S. C. 1 Mann. & Ryl. 640.

(d) *Per Lord Kenyon* *Harrison v. Jackson*, *supra*.



King William the Third, by the case of *Pinkney v. Hall* (a), and in conformity with the custom of merchants, although many cases are extant, in which, previously to that period, the power of one partner to bind his copartners by such means was recognised.

The signature of one partner, as the maker of a joint promissory note, or the drawer of a bill of exchange in respect of a joint transaction, is therefore binding upon his copartner (b), and equally binding is his acceptance of a bill of exchange (c); for, the bill being drawn upon them jointly, the acceptance of a single partner, in the names of both, is in legal effect a joint acceptance. (d) So *prima facie*, the indorsement of a bill or note by one partner, in the name of the partnership, binds all the firm. (e) Even where one partner indorses a bill in a different name from that of the actual firm, such an indorsement will be binding, if it be proved that the partner was in the habit of issuing bills into the world indorsed under the former designation: because such evidence would establish an acting by procuration, and there seems to be no doubt but that one partner may so act for the whole firm. (g) Nor in the case of a note or bill does it form any valid objection to their enforcement against a firm, that the former is made, or the latter accepted, by one partner in his individual name, if it appear from the securities themselves that it was intended they should have a joint operation: in such cases the holder may, at his election, enforce payment either jointly against the firm, or separately against the party whose signature is attached. (h) Thus, a promissory note, by which the maker individually, but

(a) 1 Salk. 126. S. C. 1 Ld. Raym. 175.

(b) *Smith v. Baily*, 11 Mod. 401. *Lane v. Williams*, 2 Vern. 277. S. C. 16 Vin. Abr. 243.

(c) Anon. Styles, 370. Bull. Nisi Prius, 279.

(d) Anon. Holt, 67. *Pinkney v. Hall*, 1 Salk. 126. S. C. 1 Ld. Raym. 175.

(e) *Wells v. Masterman*, 2 Esp. N.P.C. 731. *Swan v. Steele*, 7 East, 210. *Ridley v. Taylor*, 13 East, 175. Where a bill or note is payable to several persons, not in partnership, the right to transfer it is in all collectively, not in any individually; and an indorsement by and in the name of one only will not give the indorsee a right to sue. *Carvick v. Vickery*, Dougl. 653. n. So, where a bill is drawn on two persons, who are not partners, if it is only accepted by one, it must be protested. *Holt*, 297. Mar. 64. *Beawes*, pl. 228.

(g) *Williamson v. Johnson*, 1 B. & C. 146.

(h) *Hall v. Smith*, 1 B. & C. 407. See *Clerk v. Blackstock*, Holt's N. P. C. 474. *March v. Ward*, Peake's N. P. C. 130. *Wilks v. Back*, 2 East, 264.

on the behalf of himself and his partners, engaged to pay a stipulated sum, has been held to affect the whole firm; and it is not to be considered as a mere personal undertaking, by the individual partner, to pay a debt due from himself and his copartners. (a) In like manner, a bill of exchange drawn upon a firm, but accepted by one in the name of the other partner, is binding upon the firm, because the mere acceptance, as indicating an intention to be bound by the terms of the request in the bill, would be sufficient to give the bill validity, and the effect of that acceptance cannot therefore be controlled by the addition of the name of an individual partner. (b) And although the indorsement of one partner, which cannot be treated as the indorsement of the firm, will not render the firm liable, notwithstanding the money thereby raised be applied to partnership purposes (c); yet it is clear that a firm, consisting of several, may carry on business in the name of an individual partner, and then the whole firm will be bound by acts done by him as representing the firm. (d) Thus, where one partner of a firm in *England* proceeded to a foreign country for the purpose of establishing a branch concern, to be carried on in his individual name, with strict instructions that the names of the firm should appear as little as possible on paper, and that no greater than a stated sum should at any time be risked on partnership speculations; he, however, against those instructions, entered into risks greatly exceeding that sum, and indorsed bills in the course of such dealings in his own name, the firm in *England* subsequently sanctioning them, and the transaction being for the benefit of the partnership; it was determined that such indorsements were to be deemed the indorsements of the firm, in the name used by them for the purposes of the foreign business, and that they were liable upon those

(a) *Lord Galway v. Matthew*, 1 Campb. 403. In *Hall v. Smith*, 1 B. & C. 497, it was held that a promissory note beginning "I promise to pay," signed by one member of a firm for himself and his partners, was binding upon the party signing as a several note, or as a joint note was binding upon the firm.

(b) *Mason v. Rumsey*, 1 Campb. 384. *Wells v. Masterman*, *supra*. In the case of *Thomas v. Clarke*, 2 Stark. N. P. C. 451. Lord C. J. *Abbott* held, that a partner who executed a charter-party of affreightment, and in the commencement of it professed to contract for himself and his co-partner, thereby bound the latter, although all the stipulations and obligations in the remaining part of the instrument were made in the name of the said *freighter*.

(c) *Ex parte Emly*, 1 Rose, 61. *Emly v. Lye*, 15 East, 7.

(d) *Ex parte Bolitho*, Buck. 100.

bills. (a) And it is indisputable, that in every case in which a firm becomes, through the instrumentality of a single member, a party to a negotiable security, and the transaction which occasioned the giving the security was *bonâ fide*, and fairly referable to the partnership concerns, the act of the single partner, in pledging the joint credit, will have a conclusive binding operation upon all the partners collectively. And cases exist in which one partner may enter into a joint engagement in a transaction not relating to the partnership, and it will be binding upon the firm if it have received either their express or implied sanction. In many cases of partnership it is frequently necessary for its salvation, that the private demand of one partner should be satisfied at the moment, as the ruin of the one might affect the other partners; and therefore the firm, to avert such a possible evil, would rather allow the individual partner to liberate himself by dealing with it, than expose themselves to the consequences which might ensue from their non-acquiescence. (b) In these cases the joint liability depends upon the degree of evidence adduced to prove the authority, the mere relation of partners not of itself being sufficient to confer upon each the power of binding the firm in separate transactions. (c) The nature of the entries in the books, or the appropriation of the money to the partnership, or to a separate account, or the privity and silence of the firm, would be evidence of an authority delegated to the single partner. (d) Previous authority is not the only criterion by which to determine the joint liability of the partners under such circumstances: subsequent approbation being, for this purpose of equal efficacy; for a strong case of subsequent approbation by all the partners raises an inference of their previous positive authority having been given to the particular partner to sign the partnership name to a bill, or to negotiate it, and will subject the partners to liability in a transaction where they would not have been chargeable without such subsequent assent. (e) In instances of this description, the

(a) *South Carolina Bank v. Case*, 8 B. & C. 427. S. C. 2 Man. & Ryl. 459.

(b) *Per Lord Eldon, Ex parte Bonbonus*, 8 Vesey, 580.

(c) *Ex parte Peele*, 6 Vesey, 600. "If a man gives a partnership engagement, in the partnership name, with regard to a transaction not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say, that though in its nature not a partnership transaction, yet there was some authority beyond the mere circumstance of partnership, to enter into that contract, so as to bind the partnership." *Per Lord Eldon, Id. Ibid.*

(d) *Ex parte Bonbonus, supra.*

(e) *Id. Ibid.*



act of the partner must be ascribed rather to his character of agent than of partner; and, the agency being established, of course the partnership would be as firmly bound by his separate acts as they would have been had they expressly and personally concurred in them. But where no such agency exists, and a joint security is pledged in a transaction unconnected with the partnership, if it be manifest to the person advancing money upon it that it is sent into circulation upon the separate account of the individual partner, and, consequently, that it is against good faith that he should in such a case pledge the firm, it must be shown that he had authority to bind them; for the law does not imply an authority in individual partners over the joint fund, except in matters which affect the partnership concerns. (a) In the hands of a person aware of, and collusively partaking in the fraud committed upon the partnership by the individual partner pledging the firm in a separate transaction, the joint security would not be available. In such a case it would be the same as if the debtor had pledged the fund of a stranger for his own debt, on his own assertion that he had authority to do so: if he had such authority, the pledge would be good; but the creditor would take it at the peril of proving that authority, if it were afterwards denied. The power possessed by one partner of binding his copartners in joint transactions, without their knowledge or consent, bears in many instances sufficiently hard upon them; but it would be carrying their liability for each other's acts to a most unjust extent if it were suffered that, in a separate transaction, one partner could pledge the credit of the firm. This subject has frequently fallen under judicial consideration, and the doctrine stated has uniformly received the sanction and support of the different judges before whom it has been questioned. It is indeed indisputably settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is with-

(a) *Ex parte Agace*, 2 Cox's Ca. 312. In transactions unconnected with the joint trade, no liability will be entailed upon a dormant partner, where his responsibility was not originally regarded, and the fact of his being a partner was unknown at the time the claim arose. Therefore, where one partner accepted a bill in the name of his firm, but not in a partnership transaction, it was held that an indorsee could not maintain an action on such acceptance against a dormant partner, whose name did not appear, and who was not known to be a partner, nor the bill taken on his credit. *Lloyd v. Ashby*, 2 Carr & Pa. N. P. C. 138.

out the consent of the other partner, it is fraudulent and void. (a) Therefore, if a man, who has dealings with one partner only, draws a bill of exchange upon the partnership on account of those dealings, he is guilty of a fraud; and, in his hands, the acceptance made by the partner on the behalf of the firm would be void. (b) So, where a bill was drawn by one partner, in the joint name, to the order of his separate creditor, it was held that the latter could not recover in an action upon the bill against the firm, notwithstanding that he had not notice of the non-concurrence of the co-partner, and was not apprized that the consideration would be disputed. (c) And where in an action by an indorsee against a firm, it appeared that the bill upon which he sued was indorsed by one partner in the partnership name, and that the indorsee, at the time he discounted it, was informed that the transaction was to be concealed from the other partners, it was ruled that he could not successfully sue the partnership; because the transaction itself indicated that the money was for the separate partner's own use, and was not intended to be applied to partnership purposes. (d) Upon the same principle it is, that where one partner clandestinely draws and accepts a bill in the name of the firm, partly for a demand which the payee has against the partnership, and partly for the single partner's own debt, the payee, in an action against all the partners, can only recover upon the former part of the consideration, though money be paid into

(a) *Per Lord Ellenborough*, *Swan v. Steel*, 7 East, 210. S. C. 3 Smith, 109.

(b) *Wells v. Masterman*, 2 Esp. N. P. C. 781. In *Ex parte Goulding*, in the matter of O'Neil and Martin, bankrupts, before the Vice Chancellor, sittings after Trinity Term, 1826, a question arose, whether the joint estate of the bankrupts was liable for a bill accepted by one of them, in the name of the firm, but for his own individual debt, and without the knowledge of his co-partner. The Vice Chancellor, on account of the importance of the question, took time to consider it, and afterwards said, "I am of opinion, that where one partner gives an acceptance in the name of the firm in satisfaction of his own private debt, and without the knowledge of his co-partner, such an acceptance cannot bind the joint estate." MSS. S. C. 2 Glyn & James, 118.

(c) *Green v. Deakin*, 2 Stark. N. P. C. 347. In *Henderson v. Wild*, 2 Campb. 561. Lord *Ellenborough* held that if two persons are in partnership, and a third individual owes them a sum of money on the partnership account, a receipt for this given by one partner upon setting off a private debt due from himself to that third person will be a bar to an action by the partners for the debt due to the partnership. See *Skaife v. Jackson*, 3 B. & C. 421.

(d) *Arden v. Sharp*, 2 Esp. N. P. C. 523.

court on the count on the bill. (a) And if a partnership negotiable security be given by one partner to his creditor in discharge of an antecedent debt due from himself alone, the presumption is, that the firm is not responsible, because the separate creditor must be considered as being advertised, in the nature of the transaction, that it could not be intended to be a partnership proceeding. (b) Nor is this rule confined in its operation to the misconduct of a single partner; it applies as forcibly in a case in which the members of an old firm pledge the name of a newly admitted member, jointly with their own, to the discharge of a debt contracted anterior to the admission of that partner. In such a case, the members of the old firm cannot, without the privity of the new partner, accept a bill, in the style of the new partnership, for a debt which was due from the old firm, so as to render such acceptance available against the incoming partner in the hands of a creditor who knowingly takes such a security; for, if this were allowed, it would only be conceding to two or more partners that which is denied to a single partner, namely, the power of pledging the joint fund for their individual debts. (c) And wherever a bill is drawn or indorsed by an individual partner in the joint name under circumstances which evidently disclose that covin existed between that partner and the holder of the security, to charge the other partners without their knowledge or consent, either expressed or implied, for the private advantage of the parties to such fraudulent agreement, it is void in the hands of the covinous holder; and its validity may be impeached not only in an action by such holder against the partnership, but it may be questioned in any action instituted by him against other parties to the bill; for the bill being void, it cannot be made the foundation of an action, and, if the holder were allowed to put it in suit against other parties, the loss would eventually fall upon the partnership; for its amount must, in some way or other, be allowed in account by

(a) *Barber v. Backhouse*, Peake's N. P. C. 61.

(b) *Ex parte Bonbonus*, 8 Vesey, 540.

(c) *Shirreff v. Wilkes*, 1 East, 48. That one partner cannot pledge the security of another for his own private debt, appears to have been expressly decided in two cases referred to by Mr. *East* in a note to the foregoing decision, *viz.* in *Gregson and others v. Hutton and another*, B. R. E. 22 Geo. 3., and in *Marsh v. Vansommer and another*, London Sittings after Mich. T. 1786, *cor. Buller J.*



them, or the defendant, against whom a verdict might be obtained, would have his remedy over against the partnership. (a)

But, although a joint security, given by an individual partner for his separate debt, or in a transaction which is foreign to the partnership, is not binding upon the firm, when it is put in suit by the party who is privy to the misapplication, yet, if such a security be given to a person who, ignorant of the circumstances for which it was manufactured, and of the purposed application of its produce, takes it on the credit of the partnership name; or if, being given to one who was instrumental to the fraud committed on the partnership, it be by him afterwards negotiated, and get into the possession of a *bonâ fide* holder, the security may, in either case, be enforced against the partners collectively. Third persons, who have no knowledge of the real transaction, and who are free from all imputation, are not affected by the original fraudulent agreement, because they have a right to presume that the acting partner was, in the particular case, invested with authority from his co-partners to give circulation to the joint security. The same observation applies to the person who takes a security immediately from the partner who misconducts himself. If there be nothing in the nature of the transaction itself, from which it can fairly be inferred that he was conscious at the time of the misapplication, or if there be not any such *crassa negligentia* on his part in not inquiring whether the one partner with whom he deals is authorised to dispose of the joint security as his own, as to render the transaction on that account, fraudulent, he has a perfect right to call upon the partnership to fulfil the engagement for which their credit has been pledged by the individual partner. If the doctrine were different, no faith or reliance could be placed upon partnership securities, unless, indeed, it were incumbent upon a person receiving an apparently joint negotiable instrument, to apply to each of the parties whom it purports to affect, to know whether he assented to its negotiation, or otherwise that it should be void. Such an obligation would, in theory, be as strange and novel as it would, in practice, be in most cases impracticable, and in every case a great impediment to commerce. The law has therefore declared, that instruments affecting to charge a partnership, but which are sent into the world by an individual

(a) *Ridley v. Taylor*, 13 East, 175. See also *Hope v. Cust*, cited 1 East, 53.

partner for his own personal benefit, are invalid only in the hands of the party who is cognisant of, and privy to, the abuse of the joint name, and who is consequently a partaker in the fraud attempted to be practised upon the partnership. Thus a bill accepted by one partner in favour of a person with whom he has separate dealings would, as we have seen (a), be inoperative against the partnership, when payment of it is attempted to be enforced by the separate creditor himself, but it would be otherwise in the case of his *bonâ fide* indorsee. In the hands of the latter, the acceptance of one partner, though fraudulently made, binds the firm, because he is ignorant of the circumstances under which the security was created and circulated, and takes it on the faith and credit of the partnership name. (b) So if one partner indorse a bill in the partnership name, and send it into circulation, and it gets into the hands of a *bonâ fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that partner's own use, the partnership is liable. (c) For, in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold, that one partner, borrowing money upon a bill of exchange, by which he pledges the partnership to the repayment, cannot affect the firm merely because the money, when raised, is applied by the single partner to his own use, the discounter at the time, having no knowledge that it was, or was intended to be, a separate transaction. (d) On the same principle of want of collusion, the application by one partner of a joint bill or note, in discharge of his individual debt, does not under all circumstances necessarily invalidate it as a security against the firm. For instance, the members of a banking firm would be bound to honour their notes, in the hands of a person who received them from a single partner in payment of his own separate debt; because the creditor, having no knowledge on the subject, might rationally imagine, that the notes had been previously sent into circulation, and had returned into the possession of his debtor as his own individual property. (e) And it has been decided (g), that if a partnership security be indorsed

(a) See *ante*, p. 42.

(b) *Per Lord Kenyon*, *Wells v. Masterman*, 2 Esp. N. P. 731.

(c) *Arden v. Sharp*, 2 Esp. N. P. C. 524.

(d) *Ex parte Bonbonus*, 8 Vesey, 540.

(e) *Ridley v. Taylor*, 13 East, 175. *Arg.*

(g) *Ridley v. Taylor*, *supra*.

by one partner to his own separate creditor, against whom, neither actual covin in the transaction, nor any thing which is sufficient to warrant a conclusion of knowledge of the want of authority of the individual partner appears, the firm will be bound by the indorsement; and especially in a case in which, if covin or want of authority really did exist, the firm are in a situation clearly and positively to establish it, and they neglect to do so. In the absence of such proof, the fair and irresistible presumption is, that the partner in possession of the security had, for some valuable consideration, or in virtue of some arrangement with his copartners, become its proprietor, so as to be authorised to deal with it as his own. And this rule prevails, although, by the terms of the copartnership articles, the partners are prohibited from circulating any bills or notes, if the holder of a joint security were ignorant of that circumstance at the time he received the same; but on proof of such restrictive clause, and that the bill was issued by one partner without the concurrence, and in fraud of the others, the holder must show that he gave value for it. (a) Neither is it alone in cases of the fraudulent misconduct of partners that a joint responsibility may be brought upon a firm; for a bill which has been drawn in blank by one partner, and has been by him delivered to a clerk, to be filled up in the ordinary course of business, will, if misapplied by the clerk, be binding upon the firm in the hands of a party whose title cannot be impeached. Thus, where one of three partners drew a bill of exchange, in blank, in the name of the partnership firm, payable to their order, and delivered it, indorsed, to a clerk to be filled up for the use of the firm, as the exigences of business might require, according to their course of dealing, and the drawer dying, the surviving partners assumed a new firm; the clerk having afterwards filled up the bill, inserting a date prior to the death of the drawer, and sent it into circulation, it was held, that the surviving partners were liable to a *bonâ fide* indorsee, although no part of the value came to their hands. (b) The rule, indeed, is universal, that wherever there is an absence of collusion or privity on the part of the holder, who has given value for the bill or security he seeks to enforce against the firm, it is no impeachment of his right, to

(a) *Grant v. Hawkes*, Chitty on Bills, (5th ed.) 42 n.

(b) *Usher v. Dauncey*, 4 Campb. 97. See *Russel v. Langstaffe*, Dougl. 514. *Snaith v. Mingay*, 1 Mau. and Selw. 87.



show an original fraudulent misapplication of the security, either by a partner or a servant, because the innocent partners having clothed the particular partner or their servant with an apparent authority, it is more consonant to justice that they should suffer, than that the *bonâ fide* holder, who relied upon the joint responsibility, should sustain the loss. Nor does it in any degree affect the question, as to joint liability, that the party, after having taken and given value for the security, discovers the misappropriation of the produce: if the security be taken, in good faith, without a knowledge at the time, of the fraud contemplated by the partner, no subsequently acquired knowledge of his misconduct in giving the security can disaffirm the act. (a) Where persons are partners in a *particular* and single transaction only, and not general partners, they are not liable, even to a *bonâ fide* holder, on a bill issued by one of them in relation to a different concern. (b)

It has been ruled by Lord *Kenyon* (c), that if different firms, consisting partly of the same members, be carried on in the same name, a bill of exchange, upon which the members of one of the firms are liable, is a valid security against the members of any of the firms in the hands of the holder, without notice that it was on account of any particular partnership concern. This decision must, however, be understood with some limitation. The holder may have a right to elect against which of the partnerships he will enforce his claim, but he cannot hold all of them liable. This appears to have been the conclusion to which the *House of Lords* came in a recent case. (d) It was there decided, that where several partnerships, consisting of different individuals, carry on business under the same firm, and enter into negotiable securities under the same signature, the holder of such securities has a right to select which of those partnerships he chooses for his debtor.

On the subject of negotiable instruments it remains to be observed, that even in transactions in which all the partners are interested, the authority of one partner to make, draw, accept, or indorse promissory notes or bills of exchange in the joint

(a) *Swan v. Steel*, 7 East, 210. (b) *Williams v. Thomas*, 6 Esp. N.P.C. 18.

(c) *Baker v. Charlton*, Peake N. P. C. 79.

(d) *M'Nair v. Fleming*, Mont. on Part. 32. n. (r). *Ex relatione Sir Samuel Romilly*.

name is only implied, and may therefore be rebutted by express previous notice, to the party taking a joint security from one partner, of his want of authority, or that the others will not be liable upon it. Such a power is not indispensably essential to the existence of a partnership; the partners may stipulate between themselves, that it shall not be exercised: and if a third person, apprized of such a stipulation, will take a joint security, he cannot sue the firm upon it, although it were truly represented to him, by the partner giving the security, that the money to be advanced on it was required for the purpose of, and was in fact applied in liquidating the partnership debts; much less can he hold the firm responsible on a security so obtained, if he take it in defiance of a positive notice, previously given by one of the members, that he will not be answerable for any bill or note signed and negotiated by the others. (a) And the power of one partner to bind the firm by a negotiable security, where it is capable of being exercised, is only coexistent with the duration of the partnership itself; for, immediately on its dissolution, the power ceases. (b) Therefore, where A, after the dissolution of a partnership between himself and B, accepted a bill in the name of the partnership, bearing date before the dissolution, Lord *Ellenborough* held that an indorsee, who took the bill without notice of the dissolution, could not enforce it against B. (c) And if a dissolution is agreed upon, a person who knows of it cannot charge the partnership with a subsequent acceptance by one of the partners in the partnership name, unless he can prove that the intention to dissolve was abandoned, or that the acceptance was for a partnership transaction, and free from fraud. (d) So, although the notice of dissolution empowers one partner to receive and pay all debts due to and from the partnership, no authority is thereby conveyed to such partner to bind the firm by a bill of exchange. (e) And if, under such circumstances, a bill be drawn in the partnership name upon a debtor to the firm,

(a) *Galway v. Matthew*, 10 East, 264. S. C. 1 Campb. 403. See also *Rooth v. Quin*, 7 Price, 193. *Minnett v. Whitney*, 16 Vin. Abr. 244. *Ogilvie v. Foljambe*, 3 Meriv. 65.

(b) *Wrightson v. Pullan*, 1 Stark. N. P. C. 375. And see *Moody v. King*, 2 B. & C. 558.

(c) *Wrightson v. Pullan*, *supra*.

(d) *Paterson v. Zachariah*, 1 Stark. N. P. C. 71.

(e) *Kilgour v. Finlayson*, 1 H. Bl. 155.

which bill the partner who has the arrangement of the affairs indorses ostensibly on the behalf of the firm, and gets it discounted for the purpose of applying its proceeds towards liquidating the partnership debts, and afterwards the bill is dishonoured by the acceptor, no action upon the bill will lie against the firm at the instance of the indorsee and discounter—because, to involve the partners collectively, they should all have concurred in making the indorsement; neither can an action be maintained against all the partners for money paid to the use of the partnership. (a) Nor, in the case of a dissolution, does it signify, whether the bill or note negotiated had or had not a prior existence. The moment the partnership ceases, the partners become distinct persons: they are, from that period, tenants in common of all the property embarked in it; and if any securities which belonged to the partnership are afterwards sent into the world, all the partners must join in giving effectual negotiability to them. (b) It has even been doubted by Lord *Kenyon*, whether if an indorsement were actually made on a bill or note before a dissolution of partnership, but the bill or note were not put into circulation until afterwards, the indorsement would be so far valid as to charge the partners who were not privy to the negotiation of the instrument. (c) But this exemption from future liability is granted only on the supposition that proper means have been taken to make the dissolution notorious; and therefore a dissolution will not protect the *quondam* partners, if they suffer their names to continue on the partnership premises, and the holder of the bill or note took it *bonâ fide*, and for value and without knowledge of the dissolution. (d)

It is not however to be supposed, that the power of one partner to bind his copartners is confined solely to the using the name of the partnership firm, in the concocting and giving cir-

(a) *Kilgour v. Finlayson*, 1 H. Bl. 155.

(b) *Abel v. Sutton*, 3 Esp. N. P. C. 108. On the same principle, it has been held, that after a secret act of bankruptcy committed by one of two partners, the other cannot by an indorsement in the name of the firm transfer the property in a bill which belonged to the firm before the bankruptcy; for, the partnership having ceased to exist, the solvent partner is to be considered tenant in common with the assignees of the bankrupt partner, and the property in the bill can only be transferred by their respective indorsements. *Ramsbottom v. Lewis*, 1 Campb. 279.

(c) *Abel v. Sutton*, *supra*.

(d) *Williams v. Keats*, 2 Stark. N. P. C. 290. *Dolman v. Orchard*, 2 C. & P. 104.



ulation to negotiable instruments. Whatever other contracts relate to and are identified with the partnership can be enforced against the firm, notwithstanding they were singly entered into by an individual partner, without the express authority of the others. Thus, a contract for the sale or purchase of partnership effects, is equally valid and effectual, when made by one partner on the behalf of himself and his copartners, as if it were directly and personally ratified and assented to by all the members of the firm. Over the partnership stock one partner may exercise the *jus disponendi*, and in the absence of fraud on the part of the purchaser, the sale will be binding upon the firm. So in the case of purchases, one partner may implicate the credit of the firm; and if there be no collusion between him and the seller, the latter may resort to the firm, although the goods purchased never formed an article of joint stock. He who acts is considered as the authorised agent of the others: trade could never otherwise be carried on by more than a single individual. The power possessed by each partner, individually, of disposing of the joint merchandise has been long an admitted principle of law, and so far back as the reign of King *James the First*, it received the sanction of judicial approbation. *Lambert's* case (*a*) is thus reported: "In this case, it was agreed by the court, that the sale of one partner is the sale of them both; and therefore, although that one of them selleth the goods or merchandiseth with them, yet the action must be brought in both their names; and in such case, the defendant shall not be received to wage his law, that the other partner did not sell the goods unto him, as is supposed in the declaration." The existence of the same implied authority was recognised in a more recent case, in which Lord *Mansfield* observed, that each partner has a power singly to dispose of the whole of the partnership effects (*b*); his authority to do so being implied from the nature of business. (*c*) Indeed, partners being joint-tenants of the partnership stock, it follows that one may lawfully dispose of the whole interest in it. So with respect to purchases; a purchase by one partner on the joint account is, in contemplation of law, a purchase by the firm, and is equally binding and operative against them, as if all the members collectively had concurred

(*a*) Godbolt, 244.

(*b*) Fox v. Hanbury, Cowp. 445.

(*c*) Per Best J., Barton v. Williams, 5 B. & A. 405.

in it. (a) Nor, as regards the vendor, can the sale be impeached by the firm, merely because it was effected by the individual partner, with the fraudulent intention of cheating his copartners. With whatever view the goods are bought, or to whatever purpose they are applied, a sale to one partner is, in legal effect, a sale to the partnership, if the seller be exempt from the imputation of collusion. Therefore, where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered as a partnership transaction, and the other partner is liable for the price of the goods, without proof of any previous dealings between the parties. (b) But although an innocent seller is not to suffer for the fraud or misconduct of the partner, yet where he is expressly forbidden by one partner to deliver goods on the joint account, he must, in an action for goods sold, show that the sale was adopted by the dissentient partner, or that he derived a benefit from the delivery. (c) So one partner may order insurances to be effected on the account of his copartners, and such an order will render them all liable for the premiums. (d) He may, likewise, pledge the partnership effects, and the pledge will bind his copartners, although made without their privity and consent, if the pawnee have no notice that the property is partnership property, and there be no fraud or collusion in the transaction. For instance, where two persons purchased, for the joint account of themselves and a third person, some clover seed, and shipped and consigned the same to the latter, to whom they transmitted the bill of lading and invoice; the consignee having lodged with a factor the bill of lading for the landing and sale of the seed, and having afterwards borrowed money from him on the security of it, it was

(a) *Hyat v. Hare*, Comb. 383.

(b) *Bond v. Gibson*, 1 Campb. 185.

(c) *Willis v. Dyson*, 1 Stark. N. P. C. 164. And see — *v. Layfield*, 1 Salk. 291. *Minnett v. Whitney*, 16 Vin. Abr. 244. *Vice v. Fleming*, 1 Younge & Jerv. 226.

(d) *Hooper v. Lusby*, 4 Campb. 66. But the managing owner and part-owner of a ship has no implied authority, as such, to order insurances to be effected on account of the other part-owners. *Id. Ibid.* *Bell v. Humphries*, 2 Stark. N. P. C. 345. *French v. Backhouse*, 5 Burr. 2727., *Ogle v. Wrangham*, Abbott, 76. The distinction is, that part-owners are tenants in common, and one cannot dispose of the share of the other; but partners are joint-tenants of their merchandise, and one may dispose of the whole property.

held that the pledge was available against the shippers. (a) So where A and B directed their broker to purchase cotton, in which he was to be allowed interest to the extent of one third, he acting in the business free of commission; he also insured the goods, and deposited them in warehouses, of which he kept the key for their joint security, and throughout every part of the correspondence relative to the goods, the transaction was referred to as a joint concern, — the Court of King's Bench held that he was, *quoad hoc*, to be deemed a partner; and therefore that having pledged them without fraud or collusion on the part of the pawnee, the latter was entitled to hold them as against the principals. (b) And if one of two partners in a speculation in coffee deliver the coffee for exportation, and borrow, from the person to whom it is delivered, money, upon its security, the other partner is bound by it; and if the property, on a sale, should not produce the sum lent, he will be responsible for the difference. (c) But although one partner may pledge joint property, and the pledge will be binding upon his copartners, if fairly conducted, yet the same principle does not extend to part-owners or persons who have jointly engaged in a particular purchase: they are to be regarded as tenants in common of the subject matter of the purchase, and each being entitled to an undivided moiety only, one cannot, even before partition made, convey any better or greater title to the pawnee than he himself had (d); and after a partition has taken place, as each is then entitled to a distinct specific moiety, a pledge by one of the moiety belonging to the other is, in effect, a pledge of a specific chattel, and the property not being in the pawner, the pawnee of course cannot acquire a lien upon it, for the monies he may advance. (e) Thus, where one of two persons, partners in a particular transaction, borrowed money on partnership goods in the hands of a broker, by drawing bills on the broker, which were discounted by a third party, and the broker's warrants deposited in the hands of such third party as a security; the broker was desired by the partners to make a division of the goods held on their joint account, who accordingly appropriated

(a) *Raba v. Ryland*, Gow's N. P. C. 132. See also *S. P. Tupper v. Haythorne*, *Ibid.* 135. n. *Metcalf v. Royal Exch. Ass. Comp.*, Barnard. 343.

(b) *Reid v. Hollinshead*, 4 B. & C. 867. S. C. 6 D. & R. 444.

(c) *Ex parte Gellar*, 1 Rose B. C. 297.

(d) *Barton v. Williams*, 5 B. & A. 395.

(e) *Id. Ibid.*



specific warrants to each. Half the bills which had been discounted on the security of the warrants had been paid, and the broker, at the request of his employer, procured the same person to renew the other half, and as security lodged the warrants which had been appropriated to the other partner on the division: it was decided that the partnership had been determined by the partition, and that the second pledge was a pledge of a specific chattel belonging to another; that the discounter had no lien on the warrants (although he was entirely ignorant that any other person than his debtor had any interest in the goods), and therefore that trover was maintainable by the rightful owner against the discounter. (a) So where one partner consigns goods to another partner for a specific purpose, and in the performance of a joint contract, the consignee has no right to divert that purpose, and pledge the goods; neither has the pawnee any lien on the goods for the advances made by him, if at the time of the pledge it was within his knowledge that it was partnership property, and that the proceeds were not to be applied for the purposes of the partnership. (b) Thus, where three persons residing in *Dublin*, and different firms in *London*, jointly engaged to supply provisions for the navy, which were to be deposited in government stores, and the residents at *Dublin*, in performance of the contract, shipped a cargo of provisions to *London*, and sent to one of the firms in *London* a bill of lading, deliverable to the order of the shipper, and indorsed in blank, it was determined, that the house in *London* could not pledge the bill of lading to their own bankers (who had notice of the consignment, and knew the nature of the transaction) for advances on their own account, although there had been other transactions, independent of the contract between the house in *Dublin* and the *London* house, upon which account, the former was indebted; and although the house in *London* was under acceptances to a considerable amount, in anticipation of the particular, and other bills of lading of the shipments to be made from *Ireland*. (c)

Independently of the instances we have enumerated, one partner may, in any other case of simple contract, effectually pledge the partnership firm to the performance of an engage-

(a) S. C. in error, 1 *McClelland v. Younge*, 307.

(b) *Paley Pr. & Ag.* 180.

(c) *Snaith v. Burrridge*, 4 Taunt. 684.

ment he may singly make, if it be done in the usual and accustomed mode of dealing, and have relation to the trade in which the partners are jointly engaged. And where the transaction, which furnishes to a stranger an apparent claim upon the firm, took its origin in a dealing with one partner, strictly within the ordinary course of business, it affords the firm no ground of exemption from the responsibility created, that, in consequence of the fraudulent and dishonest conduct of the particular partner, the transaction, in respect of which they are charged, was beneficial to himself alone; for, by forming the connection of partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the compass of the partnership concerns. Therefore, if after a general partnership between two conveyancers in the country, money is received partly by one of the firm and partly by the other, to be laid out upon a mortgage, which is forged by one of the partners, without the knowledge of the other, the innocent partner is liable to repay the money. (a) Even where the representations made by one partner to a person dealing with the firm are not only untrue, but the supposed transactions, out of which a joint liability arises and to which the representations refer, are fictitious, the innocent partner will be bound to fulfil them, if it was within the scope of the particular partner's authority to do what he has untruly stated to have been done. (b) But in a matter wholly unconnected with the partnership, one partner cannot bind the others. (c) And where one engages in any contract connected with the business, from which he solely derives the benefit, and this circumstance is known to the person with whom he contracts, the firm will not be liable. Thus, where the proprietor of a stage coach intended to relinquish a part of his interest in the concern in favour of a particular person, and that person agreed with one of the proprietors of the mail coach, who was also the book-keeper, to resign the refusal to him in consideration that his family and private parcels should be carried free by the mail; and, in pursuance of such agreement, the parcels were conveyed exempt from carriage for two years,

(a) *Willet v. Chambers*, Cowp. 814.

(b) *Rapp v. Latham*, 2 B. & A. 795. And see *Harding v. Carter*, Park on Ins. 4. *Stone v. Marsh*, 6 B. & C. 551. *Hume v. Bolland*, 1 Ry. & Mood. 371.

(c) *Sandilands v. Marsh*, 2 B. & A. 678.

and one was afterwards lost; it was determined that this agreement did not bind all the proprietors, and consequently that they were not jointly responsible to make good the loss, unless actual notice of the existence of the understanding had been given to them, to which they did not object. (a) Positive consent, however, or acquiescence, which in all cases may be inferred from passive privity, will induce that responsibility upon partners which a different line of conduct would have averted. For instance, in the case to which we last alluded, all the members of the firm might have been compelled to answer in damages for the loss of the parcel, if they had been cognisant of the arrangement between the individual partner and the owner of the parcel, and had neglected to signify their disapprobation of it. Therefore, where one of several defendants partners as carriers, together with the coach-office keeper, had agreed with a party to carry at the ordinary rates, notwithstanding the notice, and there had been subsequent accounts settled upon the footing of such contract, it was held that the carriers were liable, and not only the partners at the time, but all who might afterwards become so, until special notice given, of an intention to rescind the contract. (b) So it has been determined, that where one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not only not in their usual course of dealing, but is even contrary to their arrangement with each other; yet if the business is afterwards transacted by or with the knowledge of the other partner, he is bound by the contract made by his partner. (c)

One partner can likewise bind the firm by a *guarantee* to be answerable for the debt or responsibility of a third person, given in a matter that relates to the partnership. In the case of *Hope v. Cust*, (d) Lord *Mansfield* laid down, that one partner may bind his co-partners by giving a letter of credit or guarantee in the joint name, and that the person in whose favour the guarantee is given has a remedy upon it against all the partners; although, where such an instrument is given without the consent of the other partners, and is contrary to their interests, the court will look at

(a) *Bignold v. Waterhouse*, 1 Maul. & Selw. 259.

(b) *Helshy v. Mears*, 5 B. & C. 504. S. C. 8 D. & R. 289.

(c) *Sandilands v. Marsh*, 2 B. & A. 673.

(d) Cited in *Shirreff v. Wilks*, 1 East, 53.



it very strictly; and if there be any ground for a suspicion of "covin, or such gross negligence as may amount to or be equivalent to covin," the partners will not be liable. And in a more recent case (*a*) in which a single partner, in the partnership name had guaranteed the payment of certain purchases made by a person unconnected with the firm, and the counsel (*b*) declined arguing whether such a guarantee bound the partnership, Lord *Eldon* remarked, that the objection, that the partnership was not bound by the signature of one partner, was properly abandoned. So in *Ex parte Rolfe* (*c*), the same learned lord stated the distinction to be, that a partner has no right to guarantee a separate transaction at the expense of the other partners, where they are not concerned; but that a partner may give a guarantee for his partners, in a matter that relates to the partnership. And although a case which came before Lord *Ellenborough* may appear to conflict with these authorities; yet, on close investigation, it is perfectly reconcilable. That was an action (*d*) against partners on a guarantee given by one of them without special authority, for the payment of a bill of exchange, and there being no evidence to show that the transaction was connected with the partnership, his lordship held that the guarantee was not binding on the firm; but to prove an authority so to bind the partnership, he said that a subsequent recognition would be tantamount to a previous command; and that an authority in the particular instance should be inferred, if a previous course of dealing were shown, in which similar guarantees had been given in the partnership name, with the privity of all the partners. Where one partner, with the knowledge of his co-partners, gives a guarantee in a transaction not referable to the partnership, they can of course adopt it, in which case they are concluded from objecting to the want of authority in the partner giving it; and Lord *Eldon* has said that, if partners are informed of such a measure having been taken by their partner, though perhaps not in that particular transaction, and they do not think proper to state whether they authorised such partner so to act or not, it is not too much to take it for granted that they accede to the guarantee which their partner has given. (*e*) Where a guarantee, given by one partner, has reference to business actually transacted by

(*a*) *Ex parte Gardom*, 15 Ves. 286. . (*b*) Sir S. Romilly.

(*c*) 2 Gl. & Jam. 306.

(*d*) *Duncan v. Lowndes*, 3 Campb. 478.

(*e*) *Ex parte Nolte*, 2 Gl. & Jam. 306.

the partnership, it will be binding upon the firm, though the business so transacted was out of the ordinary course of their partnership business. Thus, where A employed B and C, who were his navy agents, to lay out money in the purchase of an annuity for him, of which, and of the fact of the money being laid out, both were cognisant; but B, unknown to C, guaranteed the punctual payment of the annuity, it was held that though it was no part of the business of navy agents to negotiate annuities, yet that C was bound by this engagement of B's; for, being connected with the transaction, which both had undertaken, and to which both were privy, it became, in point of law, an assurance made by one partner with reference to business transacted by both. (a)

Although, in simple contracts, which may have a tendency to promote the common object, the act of each partner binds all the others, yet one partner cannot, as such, bind another by deed, even in commercial dealings; and this both for technical reasons, and on the general policy of the law. No custom could extend to the execution of instruments of such efficacy as deeds; the sealing and delivery by the party, or some one expressly authorised by him, who thus becomes his attorney for the purpose, are indispensably necessary; and such a power, if allowed, would have the most mischievous tendency; for, as the want of consideration for securities under seal cannot be inquired into, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners. This question was agitated in a case in which a deed was executed by one partner, in a partnership transaction, for a full and valuable consideration received by all the partners; but it was decided by the Court of King's Bench that the deed was inoperative against the firm. (b) Nor will the circumstance of the partnership being constituted by deed make any difference (c); unless a particular power authorising the partners to execute such instruments for each other be reserved. (d) It has indeed been ruled by Lord Mansfield, that, for a partnership debt, one partner has authority to exe-

(a) *Sandilands v. Marsh*, 2 B. & A. 673.

(b) *Harrison v. Jackson*, 7 T. R. 207. See also *Thomason v. Frere*, 10 East, 418.

(c) *Harrison v. Jackson*, *supra*.

(d) *Id. Ibid. Steiglitz v. Egginton*, Holt's N. P. C. 141.

ecute a bond for his co-partners (*a*); the propriety, however, of this decision cannot now be canvassed, because the facts that it involved are not sufficiently disclosed. (*b*) But, notwithstanding one partner has not an implied authority to bind his co-partners by deed, his signature to a deed on the behalf of the firm will be binding upon them, if it be done with the express sanction of the different members, and in their presence. Thus, where one partner by the authority of his co-partner, and in his presence, executed a deed for both of them, in a transaction in which they were both interested, it was decided to be a valid execution to charge both, though the deed was sealed only once. (*c*) In such a case, it is not essential that each partner should actually deliver the deed, the fact of the presence of all the partners at the time of its execution, and the circumstance of their treating the deed as their own, being sufficient to raise the inference of a constructive delivery as against all of them. (*d*) And a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both. (*e*) But a subsequent acknowledgment by one partner, that he gave an authority to execute a deed on his behalf, will not give the deed validity as against him, unless the authority itself be shown to have been legal, and under seal. (*g*)

Where one partner executes a bond in his own name and that of his co-partner, as their joint and several bond, the bond, although inoperative against the latter, is still a valid separate bond of the partner by whom it was executed; for he cannot avail himself of the objection arising from the non-execution by his co-partner. (*h*) So, if a partner, on behalf of himself and his co-partner, refer all differences between them and a third person to arbitrators, and promise to perform their award, which

(*a*) *Mears v. Serocold*, cited by *Dampier*, in arg. in *Harrison v. Jackson*, *supra*.

(*b*) *Per Lord Kenyon*, *Harrison v. Jackson*, *supra*.

(*c*) *Ball v. Dunsterville*, 4 T. R. 313. See also *Lord Lovelace's case*, Sir W. Jones, 268.—*Williams v. Walsby*, 4 Esp. N. P. C. 220.

(*d*) *Burn v. Burn*, 3 Vesey, 578.

(*e*) *Brutton v. Burton*, 1 Chit. Rep. 707. But judgment cannot be entered up against two defendants on a warrant of attorney, purporting to be an authority to confess a judgment against three, but signed only by two, the third refusing to execute it. *Harris v. Wade*, *Ibid.* 322.

(*g*) *Steiglitz v. Egginton*, Holt's N. P. C. 141.

(*h*) *Elliott v. Davis*, 2 Bos. and Pul. 338. *Hawkshaw v. Parkins*, 2 Swanst. 543.



directs, that the suits against such partner shall cease, and that he shall pay a certain sum; such partner is liable to an action for non-performance of the award, although the other partner is not made a party to the submission. (a) But where an individual partner executes a deed for himself separately, on the faith and understanding that it is to be executed by all the partners, it does not bind him unless the execution of all is procured, on the principle that the transaction is incomplete. It has, therefore, been determined that an award made against one member of a firm, by virtue of a deed of reference executed only by such member, upon the faith that it was to be executed by all the partners, is not evidence of a debt due from such partner. (b) In bankruptcy, however, as will be hereafter seen, one partner can execute a deed on behalf of himself and his co-partners, and it will be binding upon the latter. (c) This, indeed, is an exception, and has never been considered as impeaching the general rule.

But although one partner cannot, by deed, bring any fresh burden upon his co-partner, he may, by deed, bar him of a right which they possess jointly. Where there is a promise to several jointly, or there are several joint obligees or covenantees, a *release* by one binds all (d); and, as contracts with a partnership are made jointly with all its members, one may therefore defeat the claims of the rest. In this respect the law of *England* corresponds with the rule of the civil law, *Acceptilationem unius tollitur obligatio* (e); for in the same manner as a payment of the whole, to any one of the creditors, liberates the debtor against all, a release by one, which presupposes satisfaction, ought to have the same effect. This may seem hard; but a deed implies a full consideration, which, in the case of a release, would be for the joint benefit of all the partners;

(a) *Strangford v. Green*, 2 Mod. 228.

(b) *Antram v. Chase*, 15 East, 209. See also *Dutton v. Morrison*, 17 Vesey, 193. *Johnson v. Baker*, 4 B. & A. 440.

(c) *Ex parte Mitchell*, 14 Ves. 597. *Ex parte Hall*, 1 Rose, B. C. 2. *Ex parte Hodgkinson*, 19 Ves. 291. S. C. *Coop. Case*, 99. See also *post*.

(d) Co. Litt. 232. a. *Tooker's Case*, 2 Rep. 68. Bac. Abr. Tit. Release, D. Com. Dig. Tit. Release, 2 Rol. Abr. 410. *Arton v. Booth*, 4 B. Moore, 194. *Hawshaw v. Parkins*. 2 Swanst. 542. *Sheph. Touchst.* 335. *Per Lord Kenyon*, *Perry v. Jackson*, 4 T. R. 516. *Stead v. Salt*, 3 Bingh. 103.

(e) *Inst.* 1. 2. ff. de duob. reis.

and if any prejudice is sustained by the misconduct of one, the law imputes it to the folly of the others, who have associated with a man so neglectful of their interests. (a) Thus, where an action was brought by several partners as indorseees of a promissory note against the defendant as indorser, and it appeared in evidence that one of the partners had discharged a prior indorser by a deed of composition; it was holden, that such deed not only bound the partnership, but operated as a release to the defendant. (b) But, in cases of gross collusion with debtors, where fraud manifestly appears, a court of law will control the legal power of one partner to release the debt, and in the exercise of its equitable authority, will set aside a release granted by him. A strong case of fraud must, however, be clearly established in the particular instance; for although it be contrary to agreement that the releasor should interfere in the receipt or discharge of the debt released, and, on that account, his release is improper, yet, unless the transaction be proved to have been fraudulent, the release will be effectual and binding. (c) Where, therefore, two plaintiffs, who were partners, instructed their attorney to proceed to trial, in an action brought by them against the defendant for misrepresentation as to their solvency; and a few days before the trial, one of them gave a release to the defendant, without the knowledge of or communication with such attorney, the court refused to interfere. (d) But it will always be considered, in what right the release is given by a joint obligee. If he release all actions in a representative capacity, a joint bond in his own right is not discharged, and so *vice versá*. Thus, in an old case (e), A and B took an obligation from C, for the payment to them of a sum of money, and this was done by them as trustees, and for securing the payment of legacies to younger children: A brought an action on this bond, to which C pleaded a release from B; but upon *oyer* it appeared that the release was of all actions which B had *on his own account*; and in truth

(a) 6 Rep. 25. a.

(b) *Ellison and Others v. Dezell*, Bristol Sum. Ass. 1811. Selw. N. P. (5th ed.) 362.

(c) *Arton v. Booth*, 4 B. Moore, 192. See also *Legh v. Legh*, 1 Bos. & Pul. 447. *Jones v. Herbert*, 7 Taunt. 421. *Skaife v. Jackson*, 3 B. & C. 421.

(d) *Furnival v. Weston*, 7 B. Moore, 356.

(e) *Stokes v. Stokes*, 1 Vent. 35. 1 Lev. 272. 2 Keb. 530. But see *Bayley v. Loyd*, 7 Mod. 250.

B did not know of the taking of the bond, nor was he privy to the suit; and though it was objected that the release of one obligee discharged the bond, and that it must be on his own account, yet it was adjudged that the release did not operate as a bar; for that the words "*on his own account*," must have been inserted for some purpose, and could not in this case be for any other, but to distinguish demands, which B had in his own right, from those he had in right of or in trust for others. And, if A be bound to B and C, *solvend'* the moiety to B, and the other to C, the release of one shall not prejudice the other; and if there are several covenantees in the same deed, one covenantee will not be bound by a release from the others. (a)

A receipt for a joint debt by one partner will also operate the discharge of the debtor against any claim of the other partner, where the money in respect of which the receipt is given has been *bonú fide* paid. Thus, where on a dissolution of partnership it was agreed that an agent should receive the joint debts, and such agreement was recognised by a debtor of the firm, but one of the firm afterwards countermanded the agent's authority, and demanded payment of the debt, a receipt from such partner was held to discharge the debtor from future liability. (b) But a receipt is only a *primú facie* acknowledgment that a debt has been paid; and if it appears to have been obtained by fraud, it will not prevent the creditors from suing their debtor. Thus, in an action by two co-trustees for money had and received to their use, the defendant produced a receipt for the amount given by one of the plaintiffs: on the part of the plaintiffs, evidence was admitted to show that the giving the receipt was a fraudulent transaction, and that the money had not been paid, and the plaintiffs recovered. (c)

*Payment* to one partner is also payment to all, and will entail upon each the obligation of refunding if the payment was wrongful. Therefore, where one of two partners, being about to dissolve partnership, took a warrant of attorney to himself

(a) Moor, 64.

(b) Bristow v. Taylor, 2 Stark. N. P. C. 50. S. C. 6 Mau. & Selw. 156.

(c) Skaife v. Jackson, 3 B. & C. 421. And see Henderson v. Wild, 2 Campb. 561.



alone from a debtor, to secure the payment of a debt to the partnership, by instalments, and he, after the debtor had committed an act of bankruptcy, and after the dissolution of partnership, received part of such a debt, and died after the commission was sued out; it was held, that the surviving partner, in the absence of any evidence of his being exonerated by the terms of the dissolution, was liable to repay to the assignees of the debtor the money so received after his bankruptcy. (a) And, on the principle of payment to one being payment to all, an acknowledgment of payment by one partner is conclusive evidence against the demand of another. Therefore, where in the case of a particular partnership, in which two different houses, one in *London*, the other abroad, agreed to share profits of mutual consignments, recommended to each by the other; the house abroad having acknowledged the receipt and subsequent sale of goods, consigned to them by a third party, at the recommendation of the *London* house, the latter advanced money to the consignor, expecting to be repaid by the house abroad, but on the failure of that house brought an action against the consignor to recover the advances which had been made by them; it was held, that as the participation in the profits constituted a partnership between the two houses *quoad hoc*, the acknowledgment of the receipt and sale of the goods, consigned by the house abroad, was, in effect, a receipt by the house in *London*, and therefore that the advance of money was merely a payment of money, for which they were previously accountable. (b)

Independently of commercial transactions, one partner may bind another in *legal proceedings*. Partners being identified in interest, the acts and admissions of any one, with reference to the common object, are the acts and declarations of all, and are binding upon all. Therefore, until the late act of parliament, which requires a written memorandum to take any case out of the operation of the statute of limitations (c), where there was a

(a) *Biggs v. Fellows*, 8 B. & C. 402. S. C. 2 Man. & Ryl. 450. A rule nisi for entering a nonsuit in an action of trover between the same parties, for the value of goods delivered after the act of bankruptcy, and before the dissolution of partnership, was discharged, without calling upon the counsel for the plaintiff; the delivery of the goods being originally to the two partners, and the custody and the interest continuing unchanged down to the time of the final conversion by sale.

(b) *Cheap v. Cramond*, 4 B. & A. 663.

(c) 9 Geo. 4. c. 14. § 1. which enacts, that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint

joint and several engagement for the payment of money, an acknowledgment by one of the debtors of its existence was held sufficient to deprive the others of the benefit of a plea of that statute. (a) It is clear that such an acknowledgment made by an individual debtor would have revived the debt against him, and there could be no ground for distinguishing between the case of one and many debtors, where only one of them made the acknowledgment; for the party from whom the acknowledgment proceeded could not deny the existence of the debt, and if the acknowledgment of one, where only one was sued, would prevent the operation of the statute of limitations, so also would the acknowledgment of one where many were sued. To hold otherwise would have been to establish an anomaly in the law, because in other cases an acknowledgment by one of many, who are jointly concerned, is binding on the rest. (b) That doctrine has been applied to acknowledgments in cases of trespass, conspiracy, and other offences, up to high treason. (c) It follows, therefore, that admissions by one partner must be governed by the same principle, and that they will be binding on the firm. And even after a dissolution of the partnership, the admission of one partner is binding upon his co-partner if it relate to a transaction which occurred during the existence of the partnership; for, with regard to things past, the partnership is not dissolved, but only with respect to things future. (d) Thus, when the creditor of a partnership, in discharge of a demand against himself, assigned to a third person the debt owing to him by the firm, it was determined that a verbal promise, by one of the partners, to pay such debt to the assignee, was not within the statute of frauds; for it was not an undertaking for the debt of

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contractor, executor, or administrator, shall lose the benefit of the 21 Jac. 1. c. 16. (statute of limitations), so as to be chargeable in respect, or by reason only, of any written acknowledgment or promise, made and signed by any other or others of them.

(a) *Whitcomb v. Whiting*, Dougl. 651. *Perry v. Jackson*, 6 T. R. 516. *Perham v. Raynal*, 2 Bingham, 306. *acc.* But see *Bland v. Haselrig*, 2 Vent. 151. *contra.* and the observations of the Judges in delivering judgment on the cases of *Atkins v. Tredgold*, 2 B. & C. 23. and *Brandram v. Wharton*, 1 B. & A. 463. See also *Grant v. Jackson*, Peake's N. P. C. 202., and *post.* where this subject is more fully explained.

(b) *Vicary's case*, Bac. Abr. Tit. Evidence, 623. S. C. G. Evid. 51.

(c) See 1 Phill. on Evid. 96, *et seq.*

(d) *Wood v. Braddick*, 1 Taunt. 104.

another, the old debt being extinguished and a new one created : and that the promise bound, not only the party who made it, but the whole partnership, even though some of the members of the firm had retired before the promise was given ; provided the debt to which it had reference arose out of joint contracts, entered into whilst they continued in the partnership. (a) But to affect the ex-partners, after a dissolution, the admission of the single partner must clearly refer to a liability created pending the partnership ; since, if it relate to a transaction which has occurred since the separation, it is not evidence to charge them. (b) Neither is a declaration made by one of two partners, during an existing copartnership, evidence to bind his partner as to a transaction which occurred previous to the partnership, unless a joint responsibility be proved as a foundation for such evidence. (c) In an action by a firm upon a contract made with one partner, his declaration, that the property, which formed the subject matter of the contract, belonged to himself individually, and had been allotted to him out of the partnership stock, is evidence against the firm, and will prevent their maintaining a joint action for a breach of it. (d) And we have seen that one partner is competent to release a supposed right of action, even after proceedings to enforce it have been instituted by the firm. (e) And as he may release an action, it seems to follow that he has the power of suspending proceedings in it. Therefore, where three partners sued as plaintiffs, and two out of the three agreed with the defendant to accept common bail, and stay proceedings for six weeks, it was held that this agreement was binding on the third partner. (g) So, where several are

(a) *Lacy v. McNeile*, 4 Dowl. & Ryl. 13. ; and see *Israel v. Douglas*, 1 H. Bl. 239. *Wilson v. Coupland*, 5 B. & A. 228. *Wharton v. Walker*, 4 B. & C. 163.

(b) *Wood v. Braddick*, *supra*.

(c) *Catt v. Howard*, 2 Stark. on Evid. 45. S. C. 3 Stark. N. P. C. 3.

(d) *Lucas v. Delacour*, 1 Maul. & Selw. 249.

(e) See *ante* p. 61., and *Furnival v. Weston*, 7 B. Moore, 356.

(g) *Harwood and others v. Edwards*, Trin. 13 Geo. 2. B. R. MSS. In this case the plaintiffs, who were the two *Harwoods* and *Skipp*, were partners in the trade of brewers. It was stipulated by the articles, that *Skipp* was to be cash-keeper and receive the debts, but the *Harwoods* appointed another person for that purpose. The defendant was a debtor to the partnership, and *Skipp* brought the action against him in the name of himself and the *Harwoods*, but without their knowledge or consent. The *Harwoods* afterwards signed an agreement with the defendant to accept common bail and stay proceedings for six weeks ; and upon motion to file common bail and stay proceedings accordingly, the question was, whether the act of two of the



concerned together in partnership, notice to one partner is equivalent to notice to all of them, if the transaction, in respect of which the notice is given, be *bonâ fide*. (a) And notice given by one partner is available as a notice by the firm. Hence, if one of several, jointly interested in a cargo, effect an insurance for the benefit of all, he may give notice of abandonment for all. (b) It has been decided, that a note for the weekly payment under the Lords' Act may be signed by one member of a firm for himself and his partner (c): and such a note will be good and obligatory upon a retiring partner, if given after he has seceded, where the deed of dissolution empowers the remaining partners to use his name in the prosecution of all suits. (d)

The entering into a submission to *refer to arbitration* forming no part of the ordinary concerns of a commercial partnership, one partner has not an implied authority to bind his copartners

partners, in entering into such an agreement, was binding on the other, it being stipulated in the articles that one should not release or give credit without all. *Lee C. J.* "I do not see how we can enter into any stipulation in the articles between these partners, but we must consider the question as abstracted from the articles altogether, and as an agreement by two of the partners. A release by one will be a discharge in personal actions, and every one has a right to the whole personality; and if one has power to release, why may not one suspend these proceedings? Here is an agreement by two: they may discharge the suit, but they have only delayed the proceedings. If one can discharge, the majority have power to suspend." *Probyn J.* "It is the common justice of this court, if the plaintiff makes an agreement, to compel him to perform it. Here are three plaintiffs; one promotes the action, two dissent or are ignorant of it, and these two agree to accept common bail and stay proceedings, and they are as much plaintiffs as the other one. I am of opinion this agreement is good, and the court will stay proceedings pursuant to the agreement. Every partner may make an agreement to bind the other partners, and therefore the majority may bind the minority." *Chapple J.* "The dispute upon the articles of co-partnership is in the Court of Chancery. The defendant applies for the benefit of his agreement with the plaintiffs. The act of one partner is the act of all; this suit must be considered as brought by all, and this agreement must be taken to be the agreement of all." The rule was made absolute.

(a) *Per Lord Ellenborough*, in *Bignold v. Waterhouse*, 1 Mau. & Selw. 259. *Porthouse v. Parker*, 1 Campb. 82. *Alderson v. Pope*, *Ib.* 408.

(b) *Hunt v. Royal Exchange Assurance Com.*, 5 Mau. & Selw. 47. Where joint lessors are partners in trade, a notice to quit in the names of all, signed by one only, is valid. *Doe d. Elliot and others v. Hulme*, 2 Mann. & Ryl. 433.

(c) *Meux v. Humphry*, 8 T. R. 25. *Dove v. Hogg*, 1 N. R. 306.

(d) *Burton v. Issit*, 5 B. & A. 267.

by such a submission, even though it be of matters arising out of the common business. Indeed if such a delegation of authority by one partner had a binding operation on the firm, the arbitrators might, by their award, call upon the partners to do acts, which by law they could not be compelled to perform. Therefore, where a firm, consisting of five persons, sued a debtor to them, and the defendant, who pleaded the general issue, put in an award upon the matter touching which the action had been brought, but it appeared that the submission was signed by no more than three of the partners, and there was nothing to show that they had an express authority to bind the others to it, the Court of Common Pleas held, that the submission was insufficient, and the award made upon it, no bar to the action. (a) But although one partner cannot *quâ* partner bind his copartners to the performance of an award made on a submission of partnership matters, yet if by the submission he engage that they shall perform the award, he will be answerable for their obedience to it. Thus, where one partner, on the behalf of himself and his copartner, referred all differences between the plaintiff and them to arbitrators, and promised to perform their award, which was that all suits against such partner should cease, and that he should pay a certain sum; an action being brought for the nonperformance of the award, it was objected that the other partner was not made a party to the submission: but the court said, the defendant may undertake for his partner, and having engaged for him, and promised that he should perform the award on his part, notwithstanding the other partner is

(a) *Stead v. Salt*, 3 Bingh. 101. Where an award is offered in evidence, the execution of the submission deed by all the parties must be proved, since the submission of the rest is the consideration to each party to submit himself to arbitration. Thus, where there had been a deed of reference between a creditor and several partners of all co-partnership accounts, and of all matters in difference between the parties or any two of them, and an action of trover was afterwards brought by the creditor, the assignee under a commission of bankruptcy of one of the partners, (in which action the plaintiff produced the award and deed of reference as evidence of a separate debt due to him from the bankrupt,) the Court of King's Bench held, that it was indispensably necessary to prove the execution of the deed by all the parties; for this was a reference of the aggregate accounts between all and each of the partners, and the consideration to each for entering into the submission was, that each party's account should be liquidated, not only as to one, but as to all: the accession of all, therefore, ought to be proved; and, without such proof, the arbitrator would not appear to have competent authority to decide the whole question between the parties. *Antram v. Chase*, 15 East, 209.

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not bound so to do, yet if he refuse, it is a breach of the defendant's promise. (a)

One partner may, in proceedings under the *bankrupt laws*, effectually bind his copartners. Thus, although a commission of bankruptcy, which purports to issue on the petition of one only of two partners, cannot be supported, because where the debt is due to a partnership, it must appear that all the partners to whom it is due concur in the proceeding (b); yet, if the commission itself profess to have been awarded at the instance of all the partners, it will be valid, notwithstanding the affidavit grounding it, and the bond to the Lord Chancellor, were made and executed by one partner only on the behalf of the firm. (c) One partner may also prove a joint debt under the commission, or singly vote in the choice of assignees; or he may, by a power of attorney executed by himself, on the behalf of the firm, authorise a third person to represent and act for the partnership in these respects. (d) So, one partner, without consulting the other members of the firm, may sign a bankrupt's certificate, either during the continuance of the partnership or after a dissolution, upon a debt proved during the subsistence of the partnership. (e) In fact, to most important purposes, the act of one partner is, in bankruptcy, to be considered as the act of all. (g) Where one of two partners became a bankrupt, a commission issued against a debtor to the firm on the petition of the solvent partner alone, in the character of and as one of the assignees of his bankrupt partner, has been held to be regular, though the other assignees did not join in the affidavit and petition. (h)

(a) *Strangford v. Green*, 2 Mod. 228. In Com. Dig. Arbitrament, D. 2. it is laid down, "If there be a controversy between A of the one part, and B and C of the other, and B submit for himself and C, and there be an award that B shall pay; this is good, though C be a stranger."

(b) *Buckland v. Newsame*, 1 Taunt. 477. But see *Ex parte Blakey*, 1 Glyn & James. 197.

(c) *Ex parte Hodgkinson*, 19 Ves. 291. S. C. Cooper's Ca. 95. *Ex parte Roberts*, Ib. 102. *Ex parte Peele*, Buck. 457. *Ex parte Morton*, Ib. 44.

(d) *Ex parte Mitchell*, 14 Ves. 597.

(e) *Ex parte Hall*, 1 Rose, 2. S. C. 17 Ves. 62.

(g) *Per Lord Eldon*, *Ex parte Hodgkinson*, *supra*. *Ex parte Morgan*, Buck. 109. The general order of the 12th August, 1809, requires that, in cases of partnership, all petitions in bankruptcy shall, before they are presented, be signed by one of the partners; and, upon this branch of the order, it has been held, that a petition signed by one partner in the partnership name is not sufficient. *Ex parte Hall*, 1 Glyn & James. 355. n. (a.)

(h) *Ex parte Blakey*, 1 Glyn & James. 197. Where there is only one petition-



## SECT. III.

*Legal Remedies between Partners.*

HAVING considered in what cases one partner has the power of binding his copartners without their express acquiescence, we will now proceed to inquire, what remedies partners have, as between each other, for the vindication of rights when violated by one who sustains the character of a partner. These may be divided into actions at law, and suits in equity. We will, in the first place, ascertain what are the existing legal remedies. At law, there are several actions which it is competent to a partner to bring against persons who are jointly engaged with him in trade. The actions of *account*, *covenant*, *assumpsit*, and *trover*, are severally adapted to the adjustment of partnership differences; and these we will consider separately, and in the order they have been arranged.

The action of *account* has in a great measure fallen into disuse, a preference of late years being given to the mode of proceeding by bill, in a court of equity, where a discovery by the defendant's answer upon oath may be obtained. It will therefore only be necessary briefly to advert to the nature of the action. By the common law, the action of account might be maintained against a bailiff or receiver (*a*), and in favour of trade and commerce, by one merchant against another. But because the account rested in privity, executors could not in general sustain such an action (*b*): however this was remedied by the *Stat. Westm. 2* (*c*), which gave the action to executors, and according to Lord *Coke* (*d*), the stat. of 31 *Edw. 3. stat. 1.*

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ing creditor, there must be a debt due to him separately, for which he could maintain an action at law; therefore, one of two joint obligees is not by himself a good petitioning creditor against the obligor, *Buckland v. Newsame*, 1 Taunt. 477. 1 Campb. 474. ; and, so on the other hand, where one of three partners undertook to provide for bills of exchange drawn by the three, such acceptances were holden not to support a commission on a petition of the three against the acceptor. *Richmond v. Heapy*, 1 Stark. N. P. C. 202. *Sparrow v. Chisman*, 9 B. & C. 241.

(a) Co. Litt. 172. a.

(b) *Sed vide* F. N. B. 117. 11 Rep. 90. a.

(c) 13 Edw. 1. stat. 1. c. 23.

(d) Co. Litt. 89. b. 2, Instit. 404.

c. 11. gave it to administrators. The stat. 25 *Edw. 3. stat. 5. c. 5.* has extended the same remedy to the executors of executors. So at the common law, this action did not lie *against* the executors of the accountant; but by stat. 4 *Ann. c. 16. s. 27.* an action of account may be maintained against the executors or administrators of a guardian, bailiff, or receiver. The relation of partners has always been considered a sufficient privity to give them the action of account; and it is laid down by Lord *Coke (a)*, that if two joint merchants occupy their stock, goods, and merchandise in common, to their common profit, one of them, naming himself a merchant, shall have an account against the other, naming him a merchant, and shall charge him as *receptor denariorum ipsius B, ex quacunque causa et contractu ad communem utilitatem ipsorum A et B, provenien'* sicut per legem mercatoriam rationabiliter monstrare poterit. There are two judgments in this action: the first judgment is, that the defendant do account (*b*), usually termed a judgment *quod computet*; this is in the nature of an award of the court, interlocutory only and not definitive (*c*); and after such a judgment, the defendant usually offering to account, the court assigns auditors to take and declare the account between the parties. If the defendant before the auditors (*d*) plead any matter in discharge, which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who thereupon will award a *venire facias* to try it; and if on the trial the plaintiff make default, he will be nonsuited; but, notwithstanding the nonsuit, he may bring a *scire facias* upon the first judgment. The final or second judgment in account is (*e*), that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear.

A much more efficacious remedy for partners than the action of account, and one more frequently resorted to, is the action of *covenant*. If the articles by which the partnership is constituted are under seal, damages commensurate with the injury sustained by the nonperformance of any covenant or engagement contained in them may be recovered in such an action. For instance, if, in the deed of copartnership, the partners covenant each to advance a stipulated sum as capital, for the purpose of launching

(a) Co. Litt. 172. a.

(b) Co. Ent. 46 b. Rast. Ent. 17.

(c) Metcalf's case, 11 Rep. 38. a.

(d) Bull. N. P. 128.

(e) Metcalf's case, *supra*.

the partnership, an action to enforce payment, according to the covenant, will lie by one partner against the other, who fails to make the covenanted advance, and the sum agreed upon will be the measure of damages. (a) So, if a sole trader covenants, in consideration of a sum agreed to be paid by instalments, to take two persons into partnership with him for a period of eighteen years, and five months after the commencement of the partnership, when only one instalment is due, he becomes a bankrupt, still the admitted partners must pay the remaining instalments, and the assignees of the bankrupt can enforce payment of them at the respective periods of their becoming due. (b) And if a trader covenant to take a person into partnership, and to assign to him a moiety of the interest in the house, "to commence *from* and *after* a certain day then next, on the terms and conditions following, viz. the said person to pay to the said trader, *on* or *before* that day, a stated sum as a premium or fee to be admitted into the partnership, and the stock to be valued, and such person to advance a sum equal to the value of the stock, and proper articles of partnership, as soon as convenient, to be made out;" he may maintain an action of covenant upon this agreement for the nonpayment of the premium, before the articles of partnership are prepared, or the half interest in the premises is conveyed. (c) So if partners covenant to account annually, or to adjust and make a final settlement of the joint concerns at the termination of the partnership, a refusal by one partner to perform these covenants respectively will vest in the other a right of action which, when enforced at law, will entitle him to a satisfaction co-extensive with the resulting damage. (d) And where a penalty is reserved in case of breach of a partnership agreement, one partner can recover on the covenant against his copartner; and if it is stipulated in the articles of partnership that one of several partners shall sue for the penalty agreed on, and divide the amount between his copartners who have not committed a breach of the articles, such agreement will be binding, although the party appointed to sue, if he incurred the penalty, could not sue himself; as where several persons agreed to horse the several stages of a coach, and that in case of default one of

(a) *Venning v. Leckie*, 13 East, 7.

(b) *Akhurst v. Jackson*, 1 Swanst. 85. S. C. 1 J. Wilson, 47.

(c) *Walker v. Harris*, 1 Anstr. 245.

(d) *Moravia v. Levy*, 2 T. R. 483. n. *Foster v. Alanson*, 2 T. R. 479.



them specified should sue the defaulter for a penalty to be divided amongst the non-defaulters, an action brought by one on the agreement was held good. (a) The same rule applies to every other species of lawful covenant, by which partners reciprocally and severally bind themselves *inter se* to the performance of any particular act or thing. If the covenant be not performed by the covenantor, although its fulfilment cannot be enforced specifically at law, yet the copartners, upon showing that they have performed their part of the articles, may recover against him such damages as have been occasioned by his want of faith. It seems, however, that an action at law is not maintainable for the nonperformance of a covenant to refer disputes to arbitration; such a covenant having a tendency to exclude the jurisdiction of the superior courts. And independently of that objection, the covenant itself has been considered to be nugatory and futile; for as it could not appear on the trial, that the plaintiff would have succeeded on the arbitration, the court itself could not direct the jury on what rule to proceed in assessing the damages. (b) Where a penalty is reserved on a breach of the partnership articles, the payment of it may be enforced either by an action of this description, or the same object may be gained by an action of debt.

In addition to the legal remedies we have mentioned, the action of *assumpsit* is, in many instances, and more generally, adapted to the assertion of the rights of partners *inter se*. Thus, this action may be supported by one person against another for the breach of an agreement to become a partner; but in order to sustain such an action, it will be necessary to prove the specific terms of the intended partnership. (c) And where the contract of partnership is verbal, or, being reduced into writing, is not under seal, the various stipulations it embraces, the conditions and engagements it contains, and the duties it imposes, can be enforced in such an action alone; the remedy by action of covenant being confined exclusively to those cases in which the original formation of the partnership is by articles under seal. It may, therefore, be advanced as an indisputable proposition, that,

(a) *Radenhurst v. Bates*, 3 Bingham 463.

(b) *Tattersall v. Groote*, 2 Bos. & Pul. 131.

(c) *Figs v. Cutler*, 3 Stark. N. P. C. 139. And see *Gale v. Leckie*, 2 Stark. N. P. C. 107.

in whatever instances an action of covenant is maintainable for the breach of a covenant comprised in a deed of copartnership, in the same instances an action of *assumpsit* can be sustained, if the partnership, instead of being constituted by deed, were contracted verbally or by writing only. If two persons agree, in writing, to share the profit or loss upon goods bought by one of them on their joint account, an action of *assumpsit* may be maintained, founded on the agreement, by the one against the other, for the payment of his proportion of the original purchase, because, until that is paid, there cannot be any account of profit and loss between them. (a) So, were A agreed to supply B with the manuscript of a work to be printed by the latter, the profits of which were to be equally divided between them, it was held that B might maintain an action against A for refusing to supply manuscript, after part of the work had been printed; for such an action has not for its object the division of partnership profits, but is brought against the defendant for not contributing his labour towards the attainment of profits to be subsequently divided between the parties, and is therefore similar in principle to an action for not entering into partnership according to an agreement. (b)

It is, however, a well-established rule, that between partners, whether they are so in general, or for a particular transaction only, no account can be taken at law. (c) The rule is founded on this principle, that before a right of action in respect of any partnership item can be conferred, the partnership account must be taken in order to ascertain whether the particular item has been reduced in any and what degree, by the intermediate gains or losses of the partnership business; and as it would be utterly impracticable for a jury to take such an account, a court of law has not the means in its power of administering substantial justice. (d) Therefore, an action of *assumpsit* for money laid out

(a) *Venning v. Leckie*, 13 East, 7. (b) *Gale v. Leckie*, 2 Stark. N. P. C. 107.

(c) *Per Abbott C. J.*, *Bovill v. Hammond*, 6 B. & C. 151.

(d) *Smith v. Barrow*, 2 T. R. 476. *Harvey v. Crickett*, 2 Mau. & Selw. 340. Where A being indebted in his individual capacity to a house in trade, of which he was a partner, in a sum of money, the amount of which could not be ascertained, covenanted to pay the firm all his then debts, and such other debts as should subsequently accrue, and died without having satisfied the original debt, and having contracted further debts subsequent to the execution of the deed; it was held, in an action against his executors, two of whom were partners in the house of trade, that, inasmuch as there was no adjusted balance, the defendants could not plead either of

in the partnership business, will not lie by one partner against another, before an account has been taken. (a) So, where two parties agreed to procure a cargo for a ship on certain commission to be divided and received in equal moieties; it was held, that, being partners, the assignees of one, who had become a bankrupt, could not maintain an action against the other for his moiety, the balance not having been finally settled, and that it made no difference that all the receipts and disbursements had been made by the defendant, who had stated an account to the owners. (b) But the rule applies only to an unadjusted partnership account, and does not deprive a partner of his legal remedy where an account has been taken, and the balance ascertained, and an express promise to pay it has been made; in such a case there arises a moral consideration, which will clearly support an action of *assumpsit*. (c) So, on the same principle, where the balance of a partnership account has been ascertained by a colonial court of equity, and a decree made for payment, a promise to pay the debt ascertained by that decree will be presumed, and an action at law lie for the recovery of it. (d) But in the case of an adjustment between the partners themselves, the balance stated must be a final balance of all the partnership accounts; for balances struck during the continuance of the partnership, and which are preparatory only to a final account, are not sufficiently conclusive to be made the foundation of an action. Therefore, where it appeared that two persons had been engaged in running a coach, the one finding horses for one part of the road and the other for another, and that the profits of each party were calculated according to the number of miles covered by his own horses, and that one of them received the fares, and rendered an account thereof to the other every week, in an action by the former against the latter upon a separate transaction, it was held that a balance, which had been declared in favour of the latter upon these weekly accounts, could not be set off. (e)

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these debts, either by way of retainer, or as an outstanding specialty debt. *De Taset v. Shaw*, 1 B. & A. 664.

(a) *Holmes v. Higgins*, 1 B. & C. 74.

(b) *Bovill v. Hammond*, 6 B. & C. 149. *Bayley J. diss.*

(c) *Foster v. Allanson*, 2 T. R. 479.

(d) *Henley v. Soper*, 2 Mann. & Ryl. 153. S. C. 8 B. & C. 16.

(e) *Fromont v. Coupland*, 2 Bingh. 170. It has been said, that, if there are partnership dealings, and one item only remains unadjusted, the difficulty as to one partner maintaining *assumpsit* disappears. *Robson v. Curtis*, 1 Stark. N. P. C. 78.



Where a final balance is ascertained, it seems to have been considered that an express promise is not essential to the support of the action, because the law itself will raise a promise to pay (*a*); but the decision in which that principle was laid down has been impugned; and, in conformity with the prior authorities, it has been said that the promise must be express. (*b*) And it does not, in the case of a dissolution and an express promise, affect the form of the action, that the parties have covenanted under seal to settle accounts at the expiration of the partnership, and therefore that the plaintiff has a remedy of a higher nature, by an action upon the covenant; for the dissolution and the consequent settlement of accounts is of itself a sufficient consideration for a promise to pay what may be ascertained to be due. (*c*) And if the stated account is not confined to matters affecting the partnership, but includes other articles for which covenant will not lie, it is settled the action of *assumpsit* can be maintained; because by stating the account, and introducing other items not relating to the partnership, the nature of the demand is changed, and a new cause of action accrues, independent of the covenant. (*d*) So where, by agreement between partners, part of the partnership funds are expressly appropriated to the use of one of them as a security against liabilities, which he is thereby induced separately to undertake; on the fulfilment of such liabilities, he may, in an action for money had and received, recover the amount so appropriated. Thus, A, B, and C, were jointly concerned in the sale of butters, which A consigned to C, who sold them on the joint account. B, being requested to accept bills in his own name for the firm, refused to do so without some security, when C engaged, if B paid the bills, to repay him out of the proceeds received for butters already sold. B having accepted and paid the bills, it was held that he might sue C for money had and received to his use. (*e*) When one partner retains a sum of

(*a*) *Rackstraw v. Imber*, Holt's N.P.C. 368. (*b*) *Fromont v. Coupland*, *ante*.

(*c*) Per *Buller J.*, *Foster v. Allanson*, *ante*. See also *Moravia v. Levy*, there cited. But see *Schack v. Anthony*, 1 Mau. & Selw. 573.

(*d*) *Foster v. Allanson*, *ante*.

(*e*) *Coffee v. Brian*, 3 Bingham 54. The declaration in this action contained special counts on the bills, which alleged them to have been drawn on account of A and C, whereas, in fact, they were drawn on the account of A, B, and C. It was objected at the trial, and afterwards insisted upon, on a motion to set aside the verdict, that this was a fatal variance. The court, with the exception of Mr. Justice Burrough, abstained from giving any opinion on the question, conceiving that, as the contract was executed,

money belonging to another, and not received on account of the partnership subsisting between them, *quoad* this sum, they are like any other two indifferent persons, and an action of *assumpsit* may be maintained to recover it. Thus, where a member of a firm had a separate demand upon a debtor to the firm, and the debtor compounded with his creditors, and the trustees, under the deed of composition, remitted to the partners, in their joint names, a bill of exchange, which was paid to the partner, who was not a separate creditor, it was determined that the other partner might maintain *indebitatus assumpsit* for his share of the proceeds due on account of the separate debt, because, as to that portion, it was money specifically received by the one to the use of the other partner. (a) So, each subscriber to a scheme, who pays his subscription on a prospect that the scheme will continue, and does no act rendering himself liable to the expenses of attempting to bring it into operation, may, if it afterwards proves abortive, or is abandoned without any steps being taken towards carrying it into effect, recover back the whole of the money advanced by him, without the deduction of any part towards payment of the expenses incurred; and, under such circumstances, it seems, that the action may be maintained, although the scheme would have been open to the objection of illegality, had it been effectuated. Therefore, where a prospectus for establishing a scheme, called the *British Metropolitan Tontine*, was circulated, stating that the money subscribed was to be laid out at interest, and that at the expiration of a year, every subscriber should receive a shareholder's ticket, which would be saleable or transferable; and after some subscriptions had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, and before any shareholders' tickets had been delivered, the directors resolved to abandon the project; it was determined that each subscriber, in an action for money had and received, might recover the full amount of his subscription from the directors, because, until the money had been laid out in execution of the proposed scheme, the shareholders did not become jointly interested in the funds of the concern, and consequently were not partners; and that the re-

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the plaintiff might resort to the common counts; but that learned judge thought the plaintiff could not have recovered on the special counts.

(a) *Smith v. Barrow*, 3 T. R. 476.

spective subscriptions were not subject to any deduction on account of expenses; for all expenses incurred in endeavouring to bring an abortive scheme into actual operation must be borne by the original projectors, and not by those who advance their money on the faith of its going on. (a) And the steward of a benefit club has been allowed to maintain *assumpsit* against a person who had been a member of the club, and who, having possession of the funds of the society, ran away with them, and converted them to his own use. Nor was it considered any objection to such an action, that the defendant, having been a member at the time when the promise was laid to have been made in the declaration, was a partner or tenant in common; for, in consideration of his implied promise to pay the money whenever it should be demanded, and his having left the society, he was held to have treated himself as if he were no longer member, and therefore liable in such an action. (b) But where one partner receives a bill of exchange in respect of a particular partnership transaction, and indorses it to his copartner, and on its being dishonoured, promises the indorsee, that if he will take it up, he will pay him one half of the amount, it seems that, in respect of such an insulated transaction, *assumpsit* cannot be maintained by the indorsee to recover the moiety. (c) Neither can one partner maintain an action against his copartners for work and labour performed on account of the partnership, for the consequence of allowing it would be a recovery by one joint contractor against another, in which case the defendant would have a right to call upon the plaintiff for contribution. Therefore, where a subscriber to a joint undertaking acted as surveyor to the whole body of subscribers, it was held, that he could not maintain an action for work done by him, in that character, against all or any one of the other subscribers. (d) So where, upon the dissolution of a joint stock company, two of

(a) *Nockels v. Crosby*, 3 B. & C. 814. In this case it was laid down as a general principle, that where persons set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation must, in the first instance, be borne by them. When it is in operation, the expenses and charge of management should be borne by the concern, and then it may be fair and equitable that the preliminary expenses should be paid in the same way, inasmuch as the subscribers reap the full benefit of them. But even then the previous expenses are not to be paid out of the concern, unless they are adopted when it is in operation.

(b) *Sharp v. Warren*, 6 Price, 131. (c) *Robson v. Curtis*, 1 Stark. N. P. C. 78.

(d) *Holmes v. Higgins*, 1 B. & C. 74.



the members were sued by a creditor of the concern, and they employed the plaintiff, an attorney, and also a member of the company, to defend the suit; it was held, that as he himself derived a benefit from the defence, he could not sue his late copartners for the costs. (a) And where bills were drawn on the defendants, not by name, but as the directors of a company, and accepted by their secretary "for the directors," it was determined that the plaintiff, being a member of the company, could not recover, because one partner could not draw on the whole firm including himself. (b) In like manner, where a member of a joint stock company was employed by the company as their agent to sell goods for them, and received a commission of two per cent. for his trouble, and one per cent. *del credere* for guaranteeing the purchaser: having sold goods on account of the company, he drew on the purchaser a bill of exchange, payable to his, the drawer's own order; and, after it had been accepted, he indorsed it to the actuary of the company, and the latter indorsed it to another member, who was the managing director, and who purchased goods for the company, the company being then indebted to him in a larger sum than the amount of the bill. The acceptor having become insolvent before the bill became due, the drawer received from him ten shillings in the pound upon the amount of the bill by way of composition; and it was held, that the indorsee, being a member of the company, could not sue the drawer upon the bill, inasmuch as it was drawn by the latter on account of the company; and that he could not recover the sum received by the drawer on the bill, because that money must be taken to have been received by him in his character of a member of the company, and not on his own account. (c) But where the directors of a projected joint stock company contracted, in their own names, with a shareholder for the purchase of a mine; and after the formation of the company, entered into further agreements with him respecting the

(a) *Millburn v. Codd*, 6 B. & C. 419. S. C. 1 Man. & Ryl. 238. In *Parkin v. Fry*, 2 C. & P. N. P. C. 311. it was ruled, that a party, who originally invited the defendant and others to form a joint stock company, and acted himself as secretary to the committee, could not, the scheme never taking effect, maintain an action for compensation for services; but, it might have been otherwise, if they had sent for and employed him to assist them.

(b) *Neale v. Turton*, 4 Bingh. 149. In this case it was also said to be necessary that the plaintiff should show that the secretary had an express authority to accept the bills, as in general a secretary has not such power.

(c) *Teague v. Hubbard*, 8 B. & C. 345. S. C. 2 Man. & Ryl. 369.

purchase, with a clause exempting them from personal liability upon certain parts of the contract, it was held that the directors might be sued by the shareholder upon those parts of the contract to which the exemption did not apply. (a)

The remedy by an action for *contribution* cannot be extended to general partners without infringing on the principle, which denies to a partner legal redress against his copartners in the case of an unsettled account. If, therefore, one partner in a general partnership has any claim for contribution against his copartners, it seems to be the proper subject of a bill in equity only. (b) But where persons are partners in a single transaction, one of them may, in an action of *assumpsit*, for money paid to his use, enforce from the other contribution towards a debt, which he may have discharged, but to which they were jointly liable. (c) It was formerly doubted whether one of two joint contractors who had paid the whole of a joint debt could maintain an action against the other, as for money paid to his use; but the right of such an action is now perfectly settled, and it has become familiar in practice. (d) This action is not, perhaps, to be considered as founded upon contract, so much as on a fixed principle of justice, and a settled rule of law, which requires equality, according to the maxim, *qui sentit commodum sentire debet et onus*. (e) Therefore, if one of two partners discharge a joint demand, or if the debt and damages due on a joint judgment, founded on contract, be levied against him separately, he may, in an action for money paid to the use of his copartner, recover from him his proportion, because, both being *in quali jure*, each ought equally to bear the burden. (g) So, where the manager or agent of a company has paid a debt due from the company, he may compel all and each of the members to contribute their respective proportions. (h) And if two persons enter into a joint contract with the owner of a vessel to supply

(a) *Attwood v. Small*, 1 Mann. & Ryl. 246.

(b) *Per Bayley J.*, *Millburn v. Codd*, 6 B. & C. 422.

(c) *Abbott v. Smith*, 2 Blackst. 917. *Per Lord Kenyon*, *Merryweather v. Nixon*, 8 T. R. 186. *Evans v. Yeatherd*, 2 Bingh. 133.

(d) *Wright v. Hunter*, 5 Ves. 792. And see 1 East, 20.

(e) *Deering v. Lord Winchelsea*, 2 Bos. & Pul. 270.

(g) *Per Lord Kenyon*, *Herries v. Jamieson*, 5 T. R. 556. *Bayley J.*, *Ansell v. Waterhouse*, 6 Mau. & Selw. 390.

(h) *Carlen v. Drury*, 1 Ves. & Bea. 157. See *Holmes v. Williamson*, 6 Mau. & Selw. 153.

her with colonial produce by a given time; and the contract not being complied with, the owner makes a demand on one of them for compensation, who, without the knowledge or consent of the other, agrees to refer the amount of the damage sustained to an arbitrator, and pays to the owner the whole sum awarded to be due; in an action for money paid he may recover from his co-contractor a moiety of his disbursement. (a) But to enable one partner, who has paid a joint debt, to recover contribution from his copartner, it is essential that the relation of partners, and the consequent obligations, should exist *inter se*; for though persons may make themselves partners by means of their transactions with the world, and therefore be liable upon any engagement that may arise out of that relation, yet it does not follow that, with respect to each other, they are to be considered as partners, or that where one has paid the whole of a debt for which both were liable, any obligation attaches to the other to contribute to it. Thus, the manager or servant of a partnership, who acts as one of the partners in the partnership, is responsible to third persons in the character of partner, and, if sued to judgment by a joint creditor, may be compelled to pay not his proportion alone, but the whole of the joint debt; but, if he were so compelled, he would have an indisputable right to be repaid by the partnership whatever sum he may have disbursed, because, as between himself and the firm, he could not be subject to the payment of any part of the joint debts; and that being so, it is clear that if the payment were made in the first instance by either of the actual members of the firm, that member could not call upon the manager to contribute to it. (b) So, two persons, entering into a trading concern, may agree between themselves that neither shall be answerable for the acts or losses of the other, but each for his own; and, in such a case, the one cannot be compelled to contribute any proportion of a loss sustained by the other. (c) And where a Fire Assurance Company was established on the principle of mutual guarantee, and, by the articles and policies granted, it was stipulated and declared that the directors, who might execute the policies, should not be personally responsible for loss, but that the company should be liable for it to the extent of their funds; it was held, in an action on a policy against three directors who had subscribed it, to

(a) *Burnell v. Minot*, 4 B. Moore, §40.

(b) *Geddes v. Wallace*, 2 Bligh, 270.

(c) *Wagh v. Carver*, 2 H. Bl. 235.



which the defendants pleaded several pleas imputing fraud to the plaintiff, which the jury negatived by finding a verdict for him, that although no personal or individual responsibility attached to them, yet as the plaintiff was clearly entitled to recover from the funds of the society, if they were sufficient to defray the amount of his loss, and as the plaintiff averred that those funds were sufficient, which the defendants had not denied, there was not any ground for arresting the judgment. (a) Besides a joint obligation *inter se*, it is also requisite that a joint legal liability should originally have existed, or at least that the creditor should have had an equitable claim, in respect of a joint debt, upon the party paying (b); a mere voluntary payment by one partner, unconnected with legal or equitable responsibility, being insufficient to confer upon him any right, as against the other members of the firm. Therefore, where four persons, being in partnership as carriers, entered into an agreement, with a third person, to carry goods for him from *London* to *Frome*, where they were to be deposited in the warehouse of the resident partner until the owner should be ready to receive them into his own; and certain goods, having been forwarded, were, after they had been deposited in the partner's warehouse, destroyed there by fire, it was determined, that, as the liability of the partners, in their capacity of carriers, ceased on the arrival of the goods at *Frome*, the resident party, who had paid over the amount of the loss to the owner of the goods, could not recover from his copartners any proportion of the sum he had paid. (c) But where two partners executed a deed of dissolution of the partnership, whereby it was stipulated that neither of them should afterwards make any purchase to bind the other, but that every subsequent purchase should be on the private account of the purchaser, it was held, that if one afterwards made purchases in the name of the firm, and the other paid for them, he might maintain an action against the former for money paid to his use, notwithstanding the defendant had, by deed, assigned his property to his creditors, who covenanted not to sue him, and which latter deed the plaintiff himself signed. (d) And it is essential that the

(a) *Andrewes v. Ellison*, 6 B. Moore, 199.; and see *Ellison v. Bignold*, 2 Jac. & Walk. 503.

(b) *Hutton v. Eyre*, 1 Marsh, 698.

(c) *In re Webb*, 2 B. Moore, 500.

(d) *Hutton v. Eyre*, 1 Marsh, 603. S. C. 6 Taunt. 289.

debt itself should be discharged by an actual payment, since a mere extinguishment of it, by one joint-contractor giving a higher security, will not entitle him to maintain an action for money paid against his co-contractor. Thus where one of the makers of a joint and several promissory note, after the same had become due, gave his bond to the holder for the amount, but, before the commencement of the action, no money was actually paid on the bond, it was held, that until he had paid the money, he could not maintain an action to recover contribution against any of the other makers of the original note. (a)

Where a joint liability existed, and the debt or demand, in respect of which that liability was created, has actually been discharged by one partner out of his separate funds, he may nevertheless be precluded from calling upon his copartner to contribute his proportion of the debt by the illegality of the original contract; for, if the agreement, out of which the debt or demand originated, were contaminated with, or arose out of an illegal transaction, the action for a contribution cannot be sustained. Therefore, if partners are engaged in any thing *malum in se*, one of them cannot acquire a right of action by paying a sum of money which they may jointly have promised to a third person in the course of their immoral transactions. (b) So, where the transaction in respect of which the payment is made is not *malum in se*, but only *malum prohibitum*, yet if the money were advanced in the course of, and with the view of furthering, the illegal contract, a claim of contribution cannot be supported. For it is a maxim in law, that a party must show that he stands on fair ground when he calls on a court of justice to administer relief to him; and as that is far from being the case with a suitor who, as the foundation of his claim, discloses a transaction which originated out of a matter prohibited by the municipal regulations of the state, the rule of *ex turpi causa non oritur actio* applies. Thus, if one of two partners advance money in a smuggling transaction, he cannot recover his proportion of it against his partner, because the transaction is prohibited. (c) Although these points have always been considered perfectly clear considerable

(a) *Maxwell v. Jameson*, 2 B. & A. 51. *Taylor v. Higgins*, 3 East, 169. *acc. Barclay v. Gooch*, 2 Esp. N. P. C. 571. *cont.* See *Ex parte Sergeant*, 1 Glyn & James. 183.

(b) *Per Heath J.*, *Aubert v. Maze*, 2 Bos. & Pul. 371.

(c) *Per Lord Kenyon*, *Petrie v. Hannay*, 3 T. R. 418. *Ex parte Bell*, 1 Mau. & Selw. 756. *Biggs v. Lawrence*, 3 T. R. 454.

uncertainty seems for some time to have prevailed in those cases of *mala prohibita*, where the alleged right of insisting upon contribution did not arise *immediately* out of the illegal contract itself, but, to use the expression of Lord Chief Justice *Eyre* (a), was one step removed from it, as if the money were advanced by one, with the consent and by the direction of the other party involved in the illegal concern. And this distinction was drawn between the cases of partners engaged in legal and illegal contracts: in the former, if one of the partners pay the whole of a partnership debt, without any express promise from the other, the law, on the ground that both were liable to pay, will give him a right to recover back a moiety in an action for money paid to the use of that other partner. But in the case of illegal contracts, as the partners are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent: if, however, it be paid with his knowledge and consent, and by his authority, the action for contribution may be maintained, because then the action is not founded on a promise arising by implication of law out of the illegal transaction, but upon an express request subsequently made. Thus, where two persons jointly engaged in illegal stock-jobbing transactions with a third, and a loss having arisen, one of them paid the whole, and took the bond of the other for his proportion, the bond was decided to be good; for, being voluntarily given, it created a new original duty, which could not be impeached, on account of the illegality of the transactions, which gave rise to the payment it was intended to secure. (b) So, where two partners having sustained losses in similar transactions, employed a broker to pay the differences, and one of them repaid the broker the whole sum with the privity and by the direction of the other, the majority of the judges of the Court of King's Bench, contrary to the opinion of Lord *Kenyon*, determined, on the authority of the preceding case, that an action might be sustained for a moiety of the payment; but, without such direction, it was agreed that an action would not lie; for, in consequence of the illegality of the transactions, the parties were under no legal obligation to make good their losses. (c) But the sound-

(a) *Mitchell v. Cockburn*, 2 H. Bl. 379. (b) *Faikney v. Renous*, 4 Burr. 2069.

(c) *Petrie v. Hannay*, 3 T. R. 418. See the observation of Lord *Erskine* in *Ex parte Bulmer*, 13 Ves. 319.; and see *Steers v. Leshley*, 6 T. R. 61. *Brown v. Turner*, 7 T. R. 630.



ness of the distinction, established by the two last decisions, between express and implied promises has been much questioned, and the distinction itself may, perhaps, be said to have been denied. (a) For where persons engage in partnership in an illegal concern, each of them must be considered as giving an authority to the other to transact all business relating to the partnership, otherwise no profit could ever arise from the undertaking. Indeed, if such an authority were not impliedly conferred, the partnership must be terminated the moment occasion arose for the first transaction in it. The consequence, therefore, seems to be this, that if a partnership be legal, the law raises an implied consent to every payment; and if it be illegal, yet if the payment be made in the course of the partnership business, an implied consent may be raised to that payment, without which the partnership could not subsist an instant. But, consistently with the rules of law, an implied consent can, in no instance, be so raised as to confer a right of action, where the consideration for it is bottomed on an illegal contract, and the case of payments made in the course of an illegal partnership must always be open to the objection of having an illicit foundation; for if there had been no partnership, a payment, could not have arisen out of it. The distinction, therefore, on which the decisions in *Faikney v. Renous*, and *Petrie v. Hannay* proceeded, being untenable, the cases themselves cannot be supported; and notwithstanding there be an express request, the general principle, that where one person pays money for another in the course of an illegal transaction he cannot recover it back, will apply. And whatever diversity of opinion may formerly have prevailed as to the legal effect of a loan of money, where the lender knew that the money was borrowed for the purpose of being applied to an illegal purpose not *malum in se*, it is now completely established, on the ground that that which is *malum prohibitum* cannot in this view be contradistinguished from that which is *malum in se*, that the lender cannot resort to a court of justice to give effect to any claim that may arise out of the loan, even although the conduct of the borrower be most unconscientious. (b)

(a) *Aubert v. Maze*, 2 Bos. & Pul. 371.

(b) *Aubert v. Maze*, *supra*. *Webb v. Brooke*, 3 Taunt. 6. *Ex parte Mather*, 3 Ves. 373. *Ex parte Daniels*, 14 Ves. 192. *Ottley v. Brown*, 1 Ball & Beat. 366. *Lightfoot v. Tenant*, 1 Bos. & Pul. 554. *Langton v. Hughes*, 1 Mau. & Selw. 594. *Bensley v. Bignold*, 5 B. & A. 335. *Evans v. Richardson*, 3 Meriv. 470.; but see *Ex parte Bulmer*, 13 Ves. 313.

Thus, in a modern case (*a*), it was held that money lent for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was not a party, and which was so applied by the borrower, could not be recovered back. And if before the late statute enabling partners jointly to underwrite policies of insurance (*b*), one of two partners, who had engaged in such transactions, paid the whole of the losses, he could not recover a moiety of the money so paid from his copartner (*c*), although the losses paid exceeded the premiums he received. (*d*) Nor could he maintain an action against the other for premiums received by him (*e*), or to recover back advances, on account of payments to be made on policies of insurance; because such advances must have been made in the very execution of the illegal contract. (*g*) In all such cases, the claim of the plaintiff could not be established, except through the illegal contract in which all were concerned; and it would therefore have been inconsistent with the principles of justice, to have allowed a *particeps criminis* to enforce such a claim in a court of law. The same doctrine was recognised in a case which was recently brought under the consideration of the Court of Common Pleas. There A betted twenty-five guineas with B on a horse-race, of which C, at his own request, staked ten; and A having won, paid C ten guineas, in the expectation of receiving the whole amount of the bet from B, but in which, in consequence of B's death, he was disappointed. A having brought an action to recover from C the ten guineas, as having been paid on a consideration which had failed, the Court of Common Pleas held that the action was not maintainable, because A could not make out his claim without going into proof of the illegal transaction on account of which it was paid. (*h*) In a case (*i*), where one of two joint underwriters had paid to a broker a moiety of a loss sustained by them upon a policy, in an action against the broker by the underwriter who had dis-

(*a*) *Cannan v. Bryce*, 3 B. & A. 179.; and see *Amory v. Meryweather*, 2 B. & C. 573.

(*b*) 5 Geo. 4. c. 114. s. 1.; and see *ante*, p. 29.

(*c*) *Aubert v. Maze*, *ante*. (d) *Mitchell v. Cockburn*, 2 H. Bl. 379.

(*e*) *Booth v. Hodgson*, 6 T. R. 405.

(*g*) *Ex parte Bell*, 1 M. & S. 752.

(*h*) *Simpson v. Bloss*, 2 Marsh. 542. S. C. 7 Taunt. 246. and *Holt's N. P. C.* 273.

(*i*) *Sullivan v. Greaves*, Parke on Insur. 8.

charged the whole loss, it was held that he could not establish his right to the moiety so paid over; and Lord *Kenyon* observed, that a party could not appeal to a court of justice to enforce a contract founded in a breach of the law. But the authority of this determination has been subsequently shaken (*a*), and seemingly with reason; for although the underwriter has a right to shelter himself under the invalidity of such a contract, yet he may waive the benefit which, by so doing, he would derive from its illegality, and consider it as operative and binding upon him; and if he do, it is irreconcilable with justice, that a person, who is a mere instrument of transmission, should be allowed to intercept and appropriate to his own use what he receives in execution of the engagement entered into by the underwriters. Besides, in the cases of contracts rendered illegal by legislative prohibition, one partner cannot in the action of assumpsit for money paid to the use of his copartner, or in any other action, recover from him contribution, on a tort, for which both have been sued, and a joint judgment being obtained against them, the entire damages have been levied against one individually. Thus, where (*b*) a sum of money had been recovered against two defendants in an action for an injury done to a mill, in which action was included a count in trover for the machinery, one of the defendants, against whom the whole had been levied, brought an action against the other for a contribution of a moiety, as for so much money paid to his use; but the Court of King's Bench, in affirmance of the opinion of Mr. Baron *Thompson* at *Nisi Prius*, determined that such an action would not lie, since by law no contribution could be claimed as between joint wrong-doers. In a recent case, however, which was an action for contribution by one of two defendants, coach proprietors, against the other, to recover a moiety of the costs and damages recovered in an action for negligence, it was held that upon its being proved that the plaintiff was not personally

(*a*) See *Tenant v. Elliot*, 1 Bos. & Pul. 3. *Farmer v. Russel*, Ibid. 296. *Thomson v. Thomson*, 7 Ves. 473. Where the money was not actually paid, but only allowed in account between the broker and one of the underwriters, in an action against the broker by the other underwriter to recover the amount so allowed, the court would not sustain the demand; for, by so doing, they would have compelled the execution of an illegal contract, as if it were a legal one. *Edgar v. Fowler*, 3 East, 222.

(*b*) *Merryweather v. Nixan*, 8 T. R. 186. See also *Philips v. Biggs*, Hardr. 164. *Lingard v. Bromley*, 1 Ves. & Bea. 116, 17., and the observation of *Bayley J.* *Ansell v. Waterhouse*, 6 Mau. & Selw. 390.



present at the time of the injury complained of, and so in no personal default, he was entitled to recover. (a)

The action of assumpsit is in some instances a necessary remedy to enforce rights, which may result to some of the partners from the misconduct of the others, after a general partnership has been dissolved or a single joint transaction has been terminated. If, for instance, subsequently to a dissolution, a bill of exchange be drawn by a single partner in the partnership firm, and the holder of the bill proceed against all the partners, and obtain payment from those who were not privy to its concoction, they, in an action for money paid to the use of the actual drawer, may recover from him the sum they have been compelled to pay in satisfaction of the judgment obtained against them upon the bill. (b) But to enable them to obtain repayment of the sum advanced in a joint action, the payment must have been joint, and consequently must have been made out of some joint stock or fund; and, generally speaking, such a fund does not exist after a dissolution: where, however, the attorney for the parties advanced part of the sum required on their joint credit, and borrowed the remainder on their joint note, it was held that that created such a fund as would entitle them to maintain a joint action. (c) But if the payment be not of the description from which a joint cause of action can accrue, as if each individual in the first instance contribute his proportion out of his own separate funds, and with the aggregate the payment be made, then each contributor must bring a separate action for what he actually advanced, because *quoad* that payment they were not partners. (d) Therefore where there were three assignees of a bankrupt's estate who had acted in the commission, and two of them paid the solicitor's bill, it was held that the two could not maintain a joint action against the third for contribution, but that each ought to sue separately. (e) So where three had entered into a joint and several bond of indemnity to a sheriff, for the protection of their separate interests, and the sheriff had compelled two of them to pay the whole sum, it was holden that they could not maintain a joint action against the third for contribution. (g) The

(a) *Woolley v. Batte*, 2 C. & P. N.P.C. 417.

(b) *Osborne v. Harper*, 5 East, 225.

(c) *Id. Ibid.*

(d) *Id. Ibid.* *Graham v. Robertson*, 2 T. R. 282.

(e) *Brand v. Boulcott*, 3 Bos. & Pul. 235.

(g) *Kelby v. Vernon*, 5 Esp. N. P. C. 194. In the case of *Low v. Copestake*,

rule, however, which requires a severance of actions where the payment is not made out of, or in respect of any joint fund or credit, does not apply where the payment in dispute has been made by some on behalf of all the partners on a partnership account, for in such a case the action for contribution must be brought in the name of all those partners on whose behalf the payment was made. Thus, where five joint owners of a privateer and the owner of another privateer cruised in company, under an agreement to share prizes equally, and a prize being taken by the five and condemned, a moiety of it was paid to the single owner; but the sentence of condemnation being afterwards reversed, and restitution ordered, the whole value was repaid on the partnership account by three of the five, after the bankruptcy of the other two; it was decided by the Court of King's Bench, that, as the payment was on account of the partnership, the three could not maintain an action against the single owner, without joining the assignees of the bankrupt partners. (a) An undertaking by two partners to pay a sum of money to a third equally out of their own private funds, is a joint undertaking, and they can only be sued jointly upon it. (b) Where an individual is a common partner in two concerns, no legal contract can arise between the partnerships, and therefore no engagement entered into, or debt incurred, by the one with or to the other can be enforced. (c)

The general rule applicable to a bill of particulars of demand delivered under a judge's order is, that the party shall be confined to his particular, and not admitted to give evidence of any additional demand; but under certain circumstances, in a case where the proofs produced by the defendant himself established another claim in his favour, the plaintiff has been allowed to have the benefit of such evidence even beyond the contents of the particu-

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3 C. & P. N.P.C. 300., where three persons, not partners in trade, had separately indorsed a bill for the accommodation of the drawer, and, on its being dishonoured, had paid in equal portions the amount to a party who had discounted it subsequently to their indorsements, it was held that they might strike out their indorsements, and proceed jointly as possessors of the bill against a previous indorser.

(a) *Graham v. Robertson*, 2 T. R. 282.

(b) *Byers v. Dobey*, 1 H. Bl. 286.

(c) *Bosanquet v. Wray*, 2 Marsh. 319. S. C. 6 Taunt. 597. See also *Mainwaring v. Newman*, 2 Bos. & Pul. 120. *De Tastet v. Shaw*, 1 B. & A. 664. *Neale v. Turton*, 4 Bingh. 149. *Teague v. Hubbard*, 8 B. & C. 345. S. C. 2 Mann. & Ryl. 359. *Jones v. Yates*, 9 B. & C. 532. *Harvey v. Kay*, *Ibid.* 356.

lar. Thus, where an action was brought by one partner against another to recover a balance due on a statement of accounts; the plaintiff, by his bill of particulars, confined himself to the balance due on separate accounts; in support of which he gave in evidence an account, in which the defendant made himself debtor to a certain amount; and in answer to this evidence, the defendant produced an account subsequently rendered by the plaintiff, according to which there appeared to be a balance due to the defendant on the separate accounts; but on the opposite side of the page, there was a statement also of the partnership accounts, on which the balance was in favour of the plaintiff, and greatly exceeded the balance on the separate account; it was objected that the plaintiff could not recover beyond his particular. The court however said, that the defendant himself had given the plaintiff a better case than he was at liberty to make for himself, and that the plaintiff was entitled to a verdict for all that had been proved to be due to him. (a)

One partner may maintain an action at law against his copartner, notwithstanding it has been agreed between them that the matter in dispute shall be determined by an arbitration; because although a reference depending, or made and determined, might be a bar, yet a mere agreement to refer cannot oust the superior courts of their general jurisdiction. (b) It has, indeed, been said that many cases exist, in which, on a plea of an award, or of a submission to a reference, the court has gone into the merits. (c) And although partners covenant that all differences arising between them, their executors or administrators, shall be referred to the decision of two indifferent persons to be elected by the partners themselves, yet, on the death of one, an action cannot be maintained by his representatives, against the other, for refusing to nominate a referee. (d)

We have hitherto confined our investigation of the legal remedies accommodated to the adjustment of partnership differences to those actions alone which arise out of contract. The

(a) *Hurst v. Watkis*, 1 Campb. 68.

(b) *Kill v. Hollister*, 1 Wils. 129. *Thompson v. Charnock*, 8 T. R. 139. See also *James v. David*, 5 T. R. 141.

(c) *Michell v. Harris*, 4 Bro. C. C. 311. S. C. 2 Ves. jun. 129. See *Coxeter v. Anderson*, 3 Vin. Abr. 134. pl. 19.

(d) *Tattersal v. Groote*, 2 Bos. & Pul. 131.



only action of *tort* which, as between partners, can result from the relation they have contracted, is the action of *trover* to recover damages for the destruction of the joint property; but it may be doubted whether even such an action can be sustained between general partners for the destruction of any specific article of the joint property. However, it is settled that one joint-tenant, or tenant in common, cannot maintain *trover* against his companion for a thing still in his custody, because an unity of possession subsists between them, the possession of one being, in point of law, the possession of both, and the defendant may take advantage of it on the general issue. (a) Thus, where the plaintiff and the defendant C were members of a friendly society which levied a fund by weekly contribution from each other, and the aggregate sum was kept in a box deposited with the plaintiff, who gave a bond for the safe custody of it, C took the box away and delivered it to the other defendant W, who was not a member of the society; on an action of *trover* being brought, the learned judge who tried the cause nonsuited the plaintiff, and the Court of King's Bench, on an application for a new trial, confirmed the nonsuit, and said, that as all the members of the society had a joint property in the box and its contents, they were therefore tenants in common, and it was an undoubted rule that one tenant in common cannot maintain *trover* against another. And, moreover, as it was admitted that one of the defendants was a member of the society, he had a general property in the box, and therefore a special property, such as the plaintiff had (the custody only having been committed to him, and the general property still remaining in the society), could not give a right in this action against a general property. (b) So, where after an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands; then the solvent partner died, leaving the defendant his executor, and afterwards a commission of bankrupt was taken out against the surviving partner, and his estate assigned to the plaintiffs; it was holden, that they were tenants in common with the solvent partner, and after his decease with his representatives, by relation from the act of bankruptcy; and

(a) Co. Litt. 200. a. *Brown v. Hedges*, 1 Salk. 290. Bull. N. P. 34. *Brammel v. Jones*, cited Selw. N. P. (5th ed.) 1313. Com. Dig. Tit. Estates, K. 8.

(b) *Holliday v. Cammell*, 1 T. R. 658.

consequently could not maintain trover against the defendant claiming under such solvent partner. (a) Upon the same principle, where after an act of bankruptcy committed by one of two partners the other delivered goods, part of their joint property, to a creditor, for a joint debt, and died, and afterwards a commission issued against the surviving partner, it was holden that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt by relation from the act of bankruptcy, which was in the lifetime of the solvent partner, and, consequently, that the assignees could not maintain trover against such creditor. (b) But if one joint-tenant, or tenant in common, *destroy* the thing in common, the other may bring trover against him, because that amounts to a wrongful conversion. (c) Therefore, where it appeared that one tenant in common of a ship had forcibly taken it out of the possession of his companion, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into the hands of a third person, who sent it on a foreign voyage, where it was lost in a storm, this was held by Lord *King* to be evidence of a destruction, and the jury, under his directions, found it to be so. (d) The preceding case proceeded upon the principle that there was a destruction of the subject matter, and it is now established that one tenant in common cannot recover for a chattel in trover against his companion, without first proving a destruction of the chattel, or something that is equivalent to it. Hence where one of two tenants in common of a whale cut it up and expressed the oil, it was determined that such alteration in the form of the property did not amount to a tortious conversion, so as to enable the companion to maintain trover; for the act done was an application of the whale to the only purpose which could make it profitable to the owners, and tended to preserve instead of destroying it, which one tenant in common was clearly entitled to do; and as the parties were clearly tenants in common of the whale, they became tenants in common of the produce,

(a) *Smith v. Stokes*, 1 East, 363.

(b) *Smith v. Oriell*, 1 East, 368.

(c) Co. Litt. 200. a.

(d) *Barnardiston v. Chapman*, Bull. N. P. 34, 35. S. C. cited in *Heath v. Hubbard*, 4 East, 121. See also *Fenning v. Lord Grenville*, 1 Taunt. 241. *Cubitt v. Porter*, 2 Mann. & Ryl. 267. S. C. 8 B. & C. 257. *Voyce v. Voyce*, Gow's N. P. C. 201.

after it was converted into oil. (a) It does not appear to be established whether a sale by one tenant in common, or joint-tenant, of the joint property is such a conversion as will entitle the co-tenant to maintain an action of trover. There may be cases, in which the indivisible nature of the property held in common may raise an implied authority in one to sell the whole, and such a power, as we have already seen (b), is clearly vested in each member of a firm. But unless there be an express or implied authority, a sale of the whole by one tenant in common is, it seems, with respect to the other, a wrongful conversion of his undivided part. (c)

Notice by one partner that the partnership has been dissolved, is evidence against that partner that it has been dissolved by competent means, even by a deed, if a deed be essential (d); and in such a case an ejectment lies, upon the demise of one copartner against another, for a house agreed to be occupied jointly during the partnership, without proof of a notice to quit. (e)

Where the parties contest the question of partnership *inter se*, it seems that such evidence as would be sufficient to establish their partnership in a suit by a stranger will raise a presumption of the fact of partnership as amongst themselves. (g) And where A, who had been a partner with B in a particular commercial adventure, sent to B an account, stating a loss, and B, on application being made to him for one moiety of such loss, stated that he would call and settle with A, this was held to be evidence of an adjustment of the amount between the parties in an action by A to recover the moiety. (h)

(a) *Fenning v. Lord Grenville*, *ante*. It was admitted in this case, that the taking by the defendant, and the refusal to deliver on demand made, was not any misfeasance in a tenant in common, and did not give a right of action. See *Martyn v. Knowllys*, 8 T. R. 146.

(b) See *ante*, p. 51.

(c) *Barton v. Williams*, 5 B. & A. 395. *Jackson v. Anderson*, 4 Taunt. 24. *Heath v. Hubbard*, 4 East, 110. The sale of the whole of a ship by one who is only a part-owner, in exclusion of the right of another, who is tenant in common with him, is not, it should seem, equivalent to the destruction of the subject matter, mediately or immediately, so as to enable his co-tenant to maintain trover against him for it. *Id. Ibid. Com. Dig. tit. Estates K. 8.* See, also, *Graves v. Sawyer*, T. Raym. 15.

(d) *Doe d. Waithman v. Miles*, 1 Stark. N. P. C. 181. S. C. 4 Campb. 373.

(e) *Id. ibid.* (g) *Per Lord Ellenborough*, *Peacock v. Peacock*, 2 Campb. 45.

(h) *Clark v. Glennie*, 3 Stark. N. P. C. 10.



## SECTION IV.

*Equitable Remedies between Partners.*

BESIDES the legal remedies we have enumerated as being open to partners for the redress of wrongs arising *inter se*, relief is, in most instances of partnership dissensions, administered in a court of equity. Where, indeed, one partner has reason to complain of another concerning pecuniary transactions, the most advisable course to pursue is to file a bill praying a discovery, and that the defendant may account. Such a dispute, which is often of a complicated nature, and rests only in the knowledge of the party, is better adjusted in a court of equity, which applies itself to the conscience of the defaulter, and purges him upon oath, with regard to the truth of the transaction. The truth being once ascertained, the judgment is generally the same in equity that it would have been at law; but, for this purpose, the mode of administering justice in courts of equity, the mode of proof, the mode of trial, and the mode of relief, are found far better calculated for the adjustment of differences of this description, than the ordinary remedies afforded for the purpose at law.

Under the head of *account*, it has been said, partnership dealings form the subject of equitable cognizance. (a) The ground upon which courts of equity first interfered in these cases, seems to have been, the difficulty of proceeding to the full extent of justice in the courts of common law. (b) Thus, though accounts may be taken before auditors in an action of account in the courts of common law, yet a court of equity, by its modes of proceeding, is enabled to investigate more effectually long and intricate accounts in an adverse way, and to compel payment of the balance whichever way it turns. And, unless there be an admitted balance, we have seen (c), that partners cannot, in a court of law, obtain any redress through the medium of an action of *assumpsit* (d); but, in such a case, the right to an account in

(a) 3 Black. Com. 437.

(b) Lord Redesdale's Tr. on Pl. (3d ed.) 96.

(c) See *ante* p. 74.(d) See, also, *Rex v. Whitstable Company*, 7 East, 353. *Adley v. Whitstable Company*, 17 Ves. 326.

equity is clear. However, to entitle a partner to relief, it is now established, notwithstanding a former decision to the contrary (*a*), that the partnership in respect of which the relief is prayed must be legal; if it be not, a bill for an account cannot be sustained. Therefore, where two persons jointly engaged in the business of underwriters, which was prohibited by the act of parliament (*b*) in favour of the chartered companies, a bill, filed by one against the other, for an account of the profits, was dismissed. (*c*) And if an unincorporated society act, or assume to act, in a corporate character, or take upon itself the semblance of a corporation, a court of equity will not interpose its authority and grant relief *inter se*. (*d*) But where partners embark in two species of trade, the one legal and the other illegal, relief will be administered in respect of the trade that is not tainted with illegality, although with regard to the other it will be refused. Thus, where persons united in business as brokers and underwriters, on a bill being filed by the one against the other for a general account, the court allowed it as to the brokerage, but disallowed it as to the underwriting business. (*e*) And this distinction has been taken: as between the partners, no account, having reference to dealings prohibited by law, can be enforced, for this would be giving relief to a *particeps criminis*; but, after the decease of one of the partners, his executor cannot, as against creditors and legatees, refuse an account of profits made by his testator in the course of such illegal transactions. (*g*) Where the transactions, out of which the application for relief arises, do not contravene the policy of the common law, or the provisions of a statute, the remedy will not be confined to private partnerships alone, for a court of equity has jurisdiction against a corporation, in the nature of a partnership, on a bill filed for an account of the profits. (*h*) But the court, before it interferes with voluntary associations, will see that it is under an obligation to act, and

(*a*) *Watts v. Brookes*, 3 Ves. 612.

(*b*) 6 Geo. 1. c. 18. § 12. This prohibition has been removed by the 5 Geo. 4. c. 114. § 1.

(*c*) *Knowles v. Haughton*, 11 Ves. 168. *Cousins v. Smith*, 13 Ves. 542.

(*d*) *Vansandau v. Moore*, and *Kinder v. Taylor*, *coram* Lord *Eldon*, March 1825. *Lloyd v. Loaring*, 6 Ves. 773.

(*e*) *Knowles v. Haughton*, *supra*.

(*g*) *Joy v. Campbell*, 1 Sch. & Lef. 328. *Ottley v. Browne*, 1 Ball & Beat. 360.

(*h*) *Adley v. Whitstable Company*, 17 Ves. 315. S. C. 1 Meriv. 107. *Attorney General v. Governors of the Foundling Hospital*, 2 Ves. jun. 42.

that it can effectually act for the benefit of all the persons interested; and where such associations have not conformed to or observed the articles by which they were formed, the court will not interpose. Therefore, where a fire association was constituted on the principle of mutual guarantee, and the business had not been conducted consistently with the provisions of the deed of settlement, nor had the different officers been appointed, Lord *Eldon* refused to interfere on an interlocutory application, until the deed had been acted upon, and the parties invested with the characters they ought to have according to the deed. (a) And in respect to partnerships in general, it was in a late case (b) said, that there was no instance of a partner being allowed to pray for an account merely, and not for a dissolution of the partnership; for, otherwise, a partner might file a bill annually for an account, and, that a bill, to be sustainable, must either show a dissolution of the partnership, or pray that it may be dissolved. This doctrine, however, has in its generality been denied, and it has been observed, that a bill for an account is the only relief that a partner has; and, as to the necessity of praying a dissolution, it is required only in the case of an application for *interim* management, which will not be granted unless the bill contain such a prayer. (c)

It is a general rule, that however numerous the persons may be who are materially interested in the subject of a suit, they must nevertheless be all made parties, plaintiffs or defendants, so that a complete decree may be made between them (d); it being the constant aim of a court of equity to do complete justice by embracing the whole subject, and, by deciding upon and settling the rights of all persons interested, not only to make the performance of the order of the court perfectly safe to those who are compelled to obey it, but to prevent future litigation. When, therefore, one partner is compelled to institute proceed-

(a) *Ellison v. Bignold*, 2 Jac. & Walk. 503.

(b) *Forman v. Homfray*, 2 Ves. & Bea. 329. See also *Waters v. Taylor*, 15 Ves. 10.

(c) *Harrison v. Armitage*, 4 Madd. 143.; and see *Marshall v. Colman*, 2 Jac. & Walk. 266. *Knowles v. Houghton*, 11 Ves. 168. In the late case of *Kinder v. Taylor*, Lord *Eldon* expressed an opinion, that, where a partnership is limited as to time, unless a court of equity was called upon to dissolve it, it would not interfere during its subsistence for the purpose merely of directing periodical accounts to be rendered.

(d) Lord *Redesdale's* Tr. on Pl. 145.



ings in a court of equity with the view of enforcing an account from his copartners, or for any other purpose, he must, to avoid an objection of a want of parties, make all the partners parties to the record. For when the court is called upon at the instance of one partner to direct the partnership accounts to be taken, or to compel the other partners to do or to abstain from doing specific acts, it cannot administer the relief which is asked, in the absence of any of those persons upon whom the decree is intended to operate, because of its inability effectually to bind them. (a) And if all the partners are not made parties, the defendants may either demur to the bill, or, when the cause comes on to a hearing, they may object that proper parties are wanting, or the court may refuse to proceed to a decree, or if the court makes a decree, that decree may be afterwards reversed. (b) But where one of several partners agrees with a third person to give him a moiety of his share, an account may be decreed between them, without making the other partners parties. (c) And the general rule, requiring all persons interested to be brought before the court, is sometimes relaxed. Thus, where a great many individuals are concerned in the subject of the suit, the court will permit a few to represent the whole, and sue on their behalf. (d) This was done in the cases of the Opera House, the Royal Circus, and Drury-Lane Theatre. (e) And in the case of the bubble (g), in which many persons were interested, and they delegated a general power and authority to a few only, the court, to avoid the inconvenience of making the whole number parties, restrained them to the particular persons who were entrusted with the general power. With respect to this determination, it has been remarked, that if the whole was a bubble, it was not necessary to make more of the members parties; for the interest of the society, instead of being simply regulated, would be declared

(a) *Vansandau v. Moore*, and *Kinder v. Taylor*, *ante*. See *Leigh v. Thomas*, 2 Ves. sen. 312.

(b) Pr. Reg. 299. *ed. Wyatt*. Coop. Tr. on Pl. 33. A plea of want of parties will also hold, *Beames on Pl. in Eq.* 148.

(c) *Brown v. De Tastet*, 1 Jac. 284.

(d) Lord *Hardwicke's* MS. notes cited by Lord *Eldon*, 6. Ves. 779. 11 Ves. 429. *Meux v. Maltby*, 2 Swanst. 277.

(e) 6 Ves. 779. But see *Waters v. Taylor*, 15 Ves. 10.

(g) Cited by Lord *Hardwicke* in *Vernon v. Blackerby*, 2 Atk. 145.

illegal, and as all possessed the same interest in attempting to prove the legality of the scheme, the presence of any of them would be sufficient to enable the court to decide that question. (a) But where the society, in respect of which relief is asked, is not founded on such principles as to render it a bubble, it seems doubtful whether any departure from the general rule will be allowed in cases of dissensions amongst the members themselves. Lord *Eldon* has said that it is wholesome to apply the ordinary rules to such cases equally with others, as that the same parties shall be required as in another case, that the presence of parties shall not be dispensed with, and that the same regularity of proceeding shall take place. (b) This may be feasible where the number of members is manageable; but in the case of a society whose numbers are so great as to render it almost impracticable to introduce all of them on the record, an adherence to the ordinary rules may have the effect of shutting out the members of the society from all relief. And although, generally, it is true that the difficulty arising from the number of parties ought not to be allowed to baffle the means which a court of equity possesses of doing effectual justice (c), yet it should not be forgotten that to controversies in which the company may happen to be engaged with third persons the ordinary rule applies; for in a suit by them, as partners, they would be bound to set forth the names of all their body when acting against a stranger, and it would be equally incumbent on him who prosecuted claims against them to bring all before the court. The legislature, indeed, has frequently remedied the inconvenience of administering justice to such members as those of whom a company usually consists, by empowering them to sue, and rendering them liable to be sued, in the name of their secretary, or some other officer or servant of the company, and so far it renders the company a *quasi* corporation; but even in those instances, suits amongst the members themselves are not contemplated, nor is any provision made in the event of the society

(a) *Per* Lord *Eldon*, *Kinder v. Taylor*, *ante*. And see *Cousins v. Smith*, 13 Ves. 542. *Buckley v. Cater*, 17 Ves. 15. *Pearce v. Piper*, *Ibid.* 1. *Beaumont v. Meredith*, 3 Ves. & Bea. 180.

(b) *Waters v. Taylor*, 15 Ves. 10. In *Chancy v. May*, *Pre. in Ch.* 592, part of the proprietors of the Temple Mills Brass Works were permitted to bring some others of them to account without making all the members parties.

(c) *Adley v. Whitstable Company*, 1 Meriv. 109.

being divided against itself. In a late case (*a*), in which some of the members of the *Benevolent Union Society*, on behalf of themselves and the other members, filed a bill against the six defendants who were the trustees, praying an account and injunction, and that the defendants might be decreed to replace part of the stock of the society which they had sold out, and it appeared that the number of members was limited to sixty-one, that the society had been dissolved, and that forty-seven members, who were not parties, had received their shares of the trust funds, Lord *Eldon* refused to interfere until they were brought before the court. So, where upwards of one hundred persons formed themselves into a company for procuring copper, under the management of a committee, and agreeably to certain articles of copartnership; a bill filed by three of the partners against the members of the committee for inspection of the accounts, but not filed in behalf of the other shareholders, was held not sustainable; for the court could not bind all the partners as to the construction of the articles, on a matter of general interest, where three only were plaintiffs, and the committee, who were not authorised to represent the partnership, were the only defendants. (*b*) Indeed it has been considered, that if some of the members of a company were allowed to file a bill on the behalf of all, praying a dissolution, a difficulty must arise, if some of those, on whose behalf the bill purports to be exhibited, were desirous that the operations of the company should be continued. (*c*) And where some of the members of a mutual guarantee association are dissatisfied with the conduct of those to whom the management is intrusted, it seems that the court will not entertain a bill for relief unless all the members are actually brought before it, either in the characters of plaintiffs or defendants; because each has an interest in the common fund, and is entitled to be heard in every proceeding which may affect it. And a bill filed in such a case by some on behalf of themselves and all the other members of the association, will not be free from objection; for, the defendants being members, the record would present them in the double, but opposite, characters of plaintiffs and defendants, which are situations which no man can sustain at the same time. Thus,

(*a*) *Beaumont v. Meredith*, 3 Ves. & Bea. 180.

(*b*) *Baldwin v. Lawrence*, 2 Sim. & Stu. 18.

(*c*) *Carlen v. Drury*, 1 Ves. & Bea. 154.



where four members of the *Norwich Union Fire Association* (which was an institution established on the principle of mutual guarantee, and consisted of sixty thousand members,) filed a bill on behalf of all the members against the defendants, who were the directors, treasurers, bankers, and secretary (and also members) of the institution, praying relief and an injunction, Lord *Eldon*, on the ground of want of parties, refused to interpose on an interlocutory motion, and suggested his doubts as to the possibility of bringing proper parties before the court under such circumstances. (*a*) And in all cases in which an individual member of a company files a bill, complaining of mismanagement on the part of its officers, and praying that it may be dissolved, the whole number of the shareholders must, it seems, be made parties; because, as the accounts of the company must, under such a bill, be taken, the court, unless all the shareholders are before it, cannot compel each to pay in his entire subscription, which must necessarily be done before the accounts can be adjusted; nor can the court, in the absence of any of the members, dispose of their rights, or ultimately direct a sale of the property of the company. (*b*) When, therefore, dissensions exist amongst partners, it is necessary that all those who constitute the partnership should be brought before the court; and where a bill is filed for an account of partnership transactions, it is equally necessary that each individual, introduced on the record as a defendant, should sustain the character ascribed to him; for, if he do not, he may protect himself generally from answer and discovery as to the subject of the suit, by pleading that he is not a partner (*c*); and, in such a case, the court will direct an issue to try whether a partnership exists or not; of which issue, if the result is that he is not a partner, the bill will be dismissed. (*d*) But if, in addition to the general charge of the existence of the partnership, circumstances are alleged in the bill as evidence of it, a plea denying

(*a*) *Davis v. Fisk*, stated in the Appendix to Mr. Farren's Treat. on Life Assurance, p. 128.

(*b*) *Vansandau v. Moore*, and *Kinder v. Taylor*, *coram* Lord *Eldon*.

(*c*) ——— *v. Harrison*, 4 Madd. 252, overruling the case of the Marquis of Donegal *v. Stewart*, 3 Ves. 446, in which it was held that a party might avail himself of such a defence by answer. See also *Drew v. Drew*, 2 Ves. & Bea. 159. *Norway v. Roe*, 19 Ves. 144. In what cases a negative plea is good in equity, see *Beames on Pl. in Eq.* 120. *et seq.*

(*d*) *Peacock v. Peacock*, 16 Ves. 52. *Binford v. Dommett*, 4 Ves. 756.

the partnership will not protect the defendant, unless it be accompanied by an answer and discovery as to the matters specially charged as evidence of the plaintiff's title; because a defendant is bound to answer to all collateral circumstances charged as evidence of the general fact, notwithstanding his denial of the fact itself. (a) Upon a bill filed by three, on behalf of themselves and all other holders of scrip on the Peruvian loan, it was held, that having, if any, a several demand at law and in equity, they could not file one bill to have their subscriptions returned. (b)

A plea of a stated account is a good bar to a bill for an account (c), as a plea that the defendant hath fully accounted with the plaintiff himself is a good plea at law in discharge before auditors. (d) But the plea in equity must show, that the account "was in writing, and likewise the balance in writing, or at least set forth what the balance was (e)"; at the same time, "there is no absolute necessity that the account should be signed by the parties who have mutual dealings, to make it a stated account, as acquiescence in it without objection for a length of time will render it a stated account." (g) If error or fraud are charged, they must be denied by the plea, as well as by way of answer; and, if neither error nor fraud be charged, the defendant must, by the plea, aver, that the stated account is just and true, to the best of his knowledge and belief. (h) As the delivery of the vouchers to the plaintiff is, to use the expression of Lord *Hardwicke*, an affirmation, at least, that the account between the parties was a stated one; although to make it so, it is not absolutely necessary they should be delivered up when the account is settled (i); yet, when they have been delivered up, that fact constitutes a proper averment in a plea of this nature. (k)

(a) *Saunders v. King*, 6 Madd. 61. S. C. cited by Sir *John Leach* from a MS. note in *Thring v. Edgar*, 2 Sim. & Stu. 277. S. P. *Yorke v. Fry*, Ibid. 65. In a suit for an account of partnership Transactions, if the relief prayed applies to any period during which a defendant disclaiming any beneficial interest was a partner, his disclaimer is no reason why he should not be continued as a party to the suit; a party cannot disclaim his liability. *Glassington v. Thwaites*, 2 Russ. 462.

(b) *Jones v. Garcia del Rio*, 1 Turner & Russ. 297.

(c) Lord Redesd. Tr. on Pl. 210.

(d) Syst. Pl. 130.

(e) Per Lord *Hardwicke*, *Burk v. Brown*, 2 Atk. 399.

(g) Per Lord *Hardwicke*, *Willis v. Jernegan*, 2 Atk. 252.

(h) Lord Redesd. Tr. on Pl. 211.

(i) *Willis v. Jernegan*, ante. *Wharton v. May*, 5 Ves. 27.

(k) For. Rom. 57. Lord Redesd. Tr. on Pl. 211.

It has been decided, that a verbal statement of an account, and a receipt in full of all demands for the balance, did not constitute a plea in bar to a bill which sought to open the accounts, there being mistakes in the transaction. (a) And this distinction is taken in a case in *Freeman's Reports*. (b) "If a man preferreth a bill generally for an account, an account stated is a good plea; but if, in his bill, he setteth forth that there was an account, and that there was a mistake, and setteth forth the particular mistake, there an account stated is no good plea." A pure plea of a stated account would meet the first case fully, and be a complete answer to it; but such plea would not meet the second case, as it would leave the allegation of the particular mistake unanswered. (c) The same volume of *Freeman* contains a short note of another case (d), in which it is laid down, that if there be any agreement to rectify mistakes, an account stated shall not conclude, though it be under hand and seal. On the ground of fraud (e), a stated account has been opened after a considerable lapse of time (g); but the court is not, generally speaking, inclined to unravel an old account, notwithstanding it may have been settled upon an erroneous principle (h), a strong ground being necessary to impeach it. (i) Nor will the court open a settled account, where it has been signed, or a security taken on the footing of it, unless for fraud, or errors distinctly specified in the bill (k), and proved as specified. (l) The reason stated for the necessity of charging some specific error is, that there may be cases in which the opinion of the court may be clear at the hearing that there was error, and yet, if the fact were distinctly put in issue, the court might be satisfied that transactions had taken place, upon which it would be impossible to consider it error. The expression of

(a) *Walker v. Consett*, *Forest's Rep.* 167. *Chandler v. Dorset*, *Finch's Rep.* 431.

(b) *Anon.* 2 *Freem.* 62.

(c) *Beames on Pl. in Eq.* 224.

(d) *Proud v. Coombes*, 2 *Freem.* 183. S. C. 1 Ch. Ca. 55. *Nels. Rep.* 100. 3 Ch. Rep. 10.

(e) *Wharton v. May*, 5 *Ves.* 27.

(g) *Roberts v. Cuffen*, 2 *Atk.* 113. *Vernon v. Vawdry*, *Ibid.* 119. *Beaumont v. Boulton*, 5 *Ves.* 485. S. C. 7 *Ves.* 599, and 11 *Ves.* 358.

(h) *Gray v. Minnethorpe*, 3 *Ves.* 103.

(i) *Chambers v. Goldwin*, 5 *Ves.* 837.

(k) *Dawson v. Dawson*, 1 *Atk.* 1. *Taylor v. Haylin*, 2 *Bro. C. C.* 310. S. C. 1. *Cox.* 435. *Johnson v. Curtis*, 3 *Bro. C. C.* 266. *Lewis v. Morgan*, 3 *Anstr.* 769.

(l) *Drew v. Power*, 1 *Sch. & Lef.* 182, 192. *Dunbar v. Len*, 1 *Bro. P. C.* 3. *Chambers v. Goldwin*, 9 *Ves.* 265, 266. *Kinsman v. Barker*, 14 *Ves.* 579.



“errors excepted,” will not prevent an account being a settled account (*a*); and even where specific errors were alleged and proved, the court has refused, after an acquiescence of eleven years, to open the account entirely, but only allowed the plaintiff to surcharge and falsify. (*b*) In a case before Lord *Hardwicke*, his lordship observed, that “if one merchant send an account current to another in a different country, on which a balance is made due to himself, and the other keeps it by about two years without objection, the rule of this court and of merchants is, that it is considered as a stated account.” (*c*) But, in a more modern case, Sir *John Leach* held, that the naked fact of the delivery of an account, without evidence of contemporaneous or subsequent conduct, afforded no sufficient legal presumption that the account was settled. (*d*)

The statute for limitation of actions (*e*) is, likewise, where the fact admits of it, a good plea in bar to the relief sought by a bill in equity for an account (*g*); because, where the account has been closed above six years before the bill filed, without any demand upon it, the statute, it seems, notwithstanding the exception (*h*), applies, even in the case of merchants’ accounts. (*i*) Therefore, where a bill was filed against the representative of a surviving partner, praying an account of transactions that had taken place upwards of six years anterior to the filing of the bill, it was determined that a plea of the statute of limitations was an effectual bar to the relief prayed. (*k*) But although, where the

(*a*) *Johnson v. Curtis*, 3 Bro. C. C. 266.

(*b*) *Brownell v. Brownell*, 2 Bro. C. C. 62. See also *Twogood v. Swanston*, 6 Ves. 485. *Lord Courteney v. Godsall*, 9 Ves. 473. *Vernon v. Vawdry*, 2 Atk. 119.

(*c*) *Tickel v. Short*, 2 Ves. sen. 239. See 1 Ball & Beat. 428, 429. *Sherman v. Sherman*, 2 Vern. 276. *Willis v. Jernegan*, 2 Atk. 252.

(*d*) *Irvine v. Young*, 1 Simons & Stu. 333. (*e*) 21 Jac. 1. c. 16.

(*g*) *Lord Redesd. Tr. on Pl.* 218. *Wych v. East India Company*, 3 P. Wms. 309. *Lacon v. Lacon*, 2 Atk. 395.

(*h*) The enactment of the 3d section is, that “all actions of account, and upon the case, *other than such accounts as concern the trade of merchandize between merchant and merchant*, their factors, and servants, shall be commenced and sued within the time and limitation hereafter expressed; *viz.* the said actions upon the case, and the said actions of account, &c., within six years next after the cause of such actions or suits, and not after.”

(*i*) *Welford v. Liddel*, 2 Ves. sen. 400. *Crawford v. Liddel*, cited 6 Ves. 582. *Bridges v. Mitchell*, Gilb. Eq. Rep. 224. *Barber v. Barber*, 18 Ves. 286. See also argument in *Duff v. East India Company*, 15 Ves. 205.

(*k*) *Barber v. Barber*, *supra*. See also *Foster v. Hodgson*, 19 Ves. 180.

account is *settled* or *stated*, the statute is a bar; yet, if the account be *open* or *current*, it falls within the exception of the statute, and consequently does not furnish matter for a plea. (a)

As a covenant or agreement to refer partnership disputes to arbitration cannot be made the subject of a bill for a specific performance (b), so it cannot be pleaded in bar to a suit by one partner against another arising out of such disputes. (c) An agreement of that description has as little operation in equity as we have shown (d) it to possess at law. Thus (e), where one partner filed a bill against another for discovery and relief, and the defendant pleaded an agreement, that in case any difference should arise between him and the plaintiff, it was to be decided by arbitrators, Lord *Hardwicke* disallowed the plea; for, as it was a bill to discover and be relieved against frauds, the arbitrators could not examine upon oath, which, by the agreement, they should have had the power of doing. (g) This case, indeed, was overruled by Lord *Kenyon*, who, when Master of the Rolls, allowed such a plea (h), observing that the legislature had countenanced agreements of reference by the act passed in the reign of King *William* the Third (i), which was passed for facilitating the execution of them, and that before a court of equity could be called upon to interpose, an appeal must be made to the domestic forum prescribed by the articles. However, the decision of Lord *Kenyon* has been frequently impeached, and Lord *Hardwicke's* doctrine has obtained the unqualified sanction and support of succeeding judges. In approbation of it, there are the concurrent opinions of Lord

(a) *Scudamore v. White*, 1 Vern. 456. *Sherman v. Sherman*, 2 Vern. 276. *Welford v. Liddell*, 2 Ves. sen. 400. *Webber v. Tivill*, 2 Wms. Saund. 124, 127, n. (6.) In the *Harcourt MS.* Tables is the following note:—"Currency of accounts prevents the statute of limitations. *Ormston v. Hamilton*, 20th March, 1711." See also *Beam. on Pl.* in Eq. 167.

(b) *Price v. Williams*, cited 6 Ves. 818. *Milnes v. Gery*, 14 Ves. 400. *Gourlay v. Duke of Somerset*, 19 Ves. 431. *Rowe v. Wood*, 1 Jacob & Walk. 346.

(c) Lord Redesd. Tr. on Pl. 214.

(d) See *ante*, p. 89.

(e) *Wellington v. Macintosh*, 2 Atk. 570.

(g) With respect to this point, the opinion of Lord *Hardwicke* must be misreported, as the parties could not give the arbitrators a power to examine on oath. See dictum of Lord *Kenyon*, in *Halfhide v. Fenning*, 2 Bro. C. C. 336. *Street v. Rigby*, 6 Ves. 820.

(h) *Halfhide v. Fenning*, *supra*.

(i) 9 & 10 W. 3. c. 15.

*Thurlow* (a), Lord *Rosslyn* (b), Lord *Eldon* (c) and even of Lord *Kenyon* himself. (d) As a general proposition, therefore, it is true, that an agreement to refer disputes to arbitration will not compel the parties even to submit to arbitration before they apply to a court of equity for relief, although, in some cases, where the agreement itself furnishes the means of redress for the particular subject of complaint, it may be used by the defendant as an objection to the summary interference of the court upon the subject matter of such agreement. Thus, where the matter of dispute was the management of the Opera House, and the adjustment of its accounts, (which was judged peculiarly a subject for arbitration,) and where it was expressly provided, that the matter should be referred, the court recognised the principle, that an agreement to refer disputes to arbitrators was, generally speaking, no objection to a suit in equity; yet it refused, in this particular instance, to interfere in the arrangement of the matter, till a reference to arbitration had been tried. (e) So where, in a firm consisting of several hundred members, a committee of twelve was appointed to superintend the conduct of the acting managers, and, if occasion required, to call a general meeting of the members to consider the state of their affairs; half of the committee-men filed a bill against the acting managers and the other half of the committee, praying an account and dissolution of the partnership, on the grounds of gross mismanagement and neglect on the part of the managers; the court would not interfere until the remedy provided by the articles had been tried. (g) Nor, in the case of an extensive partnership, a brewery for instance, will a court of equity grant an account and dissolve the partnership, until the parties have resorted to the proceedings for terminating disputes, for which provision is made in the articles of partnership (h); unless, indeed, the means of redress chalked out by the articles are ineffectual. (i) Where the power of adjusting the affairs of the company is, by the deed of settlement,

(a) *Price v. Williams*, 6 Ves. 818.

(b) *Michell v. Harris*, 4 Bro. C. C. 311. S. C. 2 Ves. jun. 129. See also *Tattersall v. Groote*, 2 Bos. & Pul. 131.

(c) *Waters v. Taylor*, 15 Ves. 10. *Street v. Rigby*, 6 Ves. 815. *Nicholls v. Chalie*, 14 Ves. 270.

(d) *Thompson v. Charnock*, 8 T. R. 139. (e) *Waters v. Taylor*, 15 Ves. 18.

(g) *Carlen v. Drury*, 1 Ves. & Bea. 154. (h) *Id. Ibid.*

(i) *Id. Ibid.* See also *Gourlay v. Duke of Somerset*, 19 Ves. 431.



vested in general meetings of the proprietors to be convened at the discretion of the managers, the court, on the ground of its being *casus omissus*, will compel the managers to appoint meetings. (a)

Where an account is to be taken, each partner is entitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge his co-partner in that account with what he has not brought in, and with what he has taken out, beyond the proportion to which he was entitled; and nothing is to be considered as his share but his proportion of the residue in the balance of the account. (b) Partners, however, may, as amongst themselves, stipulate that the accounts shall be adjusted in a particular manner; and, in that case, although the mode prescribed interfere with the general rules laid down by the court for the taking of such accounts, the court will abide by and settle the account on the footing of such special agreement. But where partnership articles contain special clauses for taking the accounts, on which the partners have not acted, the articles are read in equity as if those clauses were expunged, and the accounts will be taken in the usual way. (c) It has been decided by the Court of Exchequer (d), that if two persons enter into the wine trade, intending originally that both should reside upon the premises, and one of them afterwards removes to a separate dwelling, leaving the other in the possession of the premises, and in the management of the whole business, the latter, on taking the account, is not entitled to be reimbursed usual and necessary expenses he may have incurred in treating the customers, where balances have been struck yearly, and no demand in respect of them has been made. To justify such an allowance to the acting partner, it ought either to be sanctioned by an universal custom in the trade, or should be made matter of express stipulation between the parties themselves, by the articles of copartnership, if, in the first instance, it be intended that the active management should devolve upon a single partner; or, if that be not so, and circumstances effect a change in their original intention, by some

(a) *Per Lord Eldon, Carlen v. Drury, ante.*

(b) *West v. Skipp*, 1 Ves. sen. 242, S. C. 2 Swanst. 586.

(c) *Per Lord Eldon, Jackson v. Sedgwick*, 1 Swanst. 469.; and see *Geddes v. Wallace*, 2 Bligh. 270. *Petty v. Janeson*, 6 Madd. 146.

(d) *Thornton v. Proctor*, 1 Anstr. 94.

subsequent agreement. But, in the taking of an account, interest will be charged upon money borrowed by one partner of the firm upon his promissory note, though the borrower had a greater sum in the joint stock than the amount of the loan; for the stock is only to be employed in augmentation of the trade for the mutual benefit of all, and not for the private advantage of individual partners. (a) In general, a partner, who, in his answer to a bill filed for an account of partnership transactions, insists that the balance of the account is in his favour, is not obliged to bring into court what is in his hands, unless the other partners do the same; but, if he have received money under circumstances from which it can be inferred that he had agreed not to receive it, he will then be ordered to bring it into court, however large the balance due to him may happen to be, because his conduct is not compatible with good faith. Thus, where the defendant, a member of a firm in the country, which it was the intention of the parties to dissolve, stated that he must go to *London* to consult a friend on the subject, before he could accede to the terms of the dissolution, but on his journey went to several debtors of the firm, and received from them partnership debts, he was ordered to pay the money into court. (b)

Where one partner discharges a partnership debt out of his own individual funds, equity will enforce a contribution. (c) Formerly, contribution was always obtained through the medium of a bill in equity, although, the right to the satisfaction being positive, actions at law between partners for a contribution have latterly become frequent. (d) This concurrent exercise of jurisdiction does not, however, oust courts of equity of the power they originally possessed of entertaining cognizance of such subjects, since the fact, that courts of law have assumed jurisdiction, can afford no reason why the equitable authority should not be maintained. In some cases, as if there were ten persons severally bound to contribute, the equitable relief would be more readily obtained, and at a less expense than any legal redress; for in a court of equity all the persons from whom contribution is claimed might be comprehended in a single suit;

(a) *Beecher v. Guilburn*, *Moseley*. 3.

(b) *Foster v. Donald*, 1 Jacob & Walk. 252.

(c) *Wright v. Hunter*, 5 Ves. 792. *Abbot v. Smith*, 2 Blackst. 947. *Deering v. Lord Winchelsea*, 2 Bos. & Pul. 270.

(d) *Wright v. Hunter*, *supra*. S. C. 1 East, 20. But see *ante*, p. 79.

whereas, at law, a separate action must be brought against each for his proportion. (a) And if one of the parties jointly bound be insolvent, contribution for his share cannot at law be recovered against the others, but it is the subject matter of a proceeding in equity only; for the legal remedy is founded upon the principle, that one pays that to which all are liable. (b)

A court of equity will likewise interfere to protect a party upon whom a fraud has been practised; and where a premium has been fraudulently obtained from a person as a consideration for entering into a partnership, it will order the premium to be returned, treating the articles of partnership as a nullity, in consequence of the fraud. (c) Thus, where A, an attorney, prevailed on B to become a partner with him, and B paid a premium; but, before fourteen months had expired, A sued out a commission of bankruptcy against B, and thus dissolved the partnership: this was held to be a fraud upon B, and A was decreed to return part of the premium which had been paid, and to deliver up a bond given to secure the remainder; but an allowance was directed to be made in respect of the time the partnership subsisted. (d) So where, on the retirement of one of two partners from trade, it was left to arbitrators to determine, amongst other things, what was to be paid to the retiring partner for the goodwill of the trade; and they, on an understanding that the retiring partner would not set up the trade in the same street, or its vicinity, awarded a certain sum as the share of the retiring partner for the goodwill, which was paid; but no restraint being expressly placed upon him in that respect by the award, he afterwards set up the trade in the same neighbourhood; the Court of Chancery, on parol evidence of the understanding on which the award was made, enjoined him, on the ground of fraud, from carrying on the trade in that neighbourhood. (e) And where the plaintiffs and the defendants, being

(a) *Wright v. Hunter*, ante. S. C. 1 East, 20.

(b) *Per Holroyd J.*, in *Collins v. Prosser*, 1 B. & C. 688. See also *Cowell v. Edwards*, 2 Bos. & Pul. 251. *Ex parte Hunter*, Buck, 552. *Ex parte Smith*, Ibid. 492. *Madox v. Jackson*, 3 Atk. 406. *Cockburn v. Thompson*, 16 Ves. 326. *Sainstry v. Grammer*, 2 Eq. Ca. Abr. 165. pl. 6.

(c) *Per Lord Eldon*, *Tattersall v. Groote*, 2 Bos. & Pul. 131.

(d) *Hamil v. Stokes*, 1 Daniell, 20. S. C. 4 Price, 166. And see *Ackhurst v. Jackson*, 1 Swanst. 89. *Ex parte Broome*, 1 Rose, 71.

(e) *Harrison v. Gardner*, 2 Madd. 198. See also *Williams v. Williams*, 2 Swanst. 253. *Kennedy v. Lee*, 3 Meriv. 441.



carriers, agreed to horse certain portions of the road, but that no partnership should exist between them, but each be considered as carrying on within their limits an exclusive business; and one agreed with the mint, for himself and the other parties, to carry coin to places on the line of road, and afterwards made another agreement with the mint to carry to other places not on the road; it was held, that it appearing that the officers of the mint dealt with him partly on the policy of the old agreement, and that he did not apprise them he was dealing exclusively on his own account, the other parties were entitled to share in the profits. (a) Another head of fraud, which a court of equity will not sanction or permit, is that of one partner unduly pledging the partnership firm in discharge of his own individual debt, or in a transaction wholly unconnected with the common interest of all the partners. (b) Thus, where one partner indebted to the partnership, and unable to pay his separate bill holden by his bankers, substituted by negotiation with them a partnership security, without the knowledge or consent of his partners, and of which the bankers were also aware, an injunction to restrain the bankers from negotiating it was granted. (c) So, if one partner make the partnership liable for his separate debt, and his executrix confess judgment, a court of equity will restrain proceedings under the judgment. (d) It will also restrain one partner from using the name of both in an improper manner, as from accepting or negotiating bills of exchange for or in the name of the partnership, unless the same be accepted or negotiated for the purpose of the partnership. (e) And in a case (g) where a partner, under a parol agreement for a partnership, filed a bill against his copartner, charging him with misconduct and praying a dissolution, account, and injunction against executing securities in the name of the firm; the defendant demurred, upon the ground, that as the partnership existed only by the fact of the partners' acting together, the prayer that the court would do what they had a right to do themselves was nugatory; but the court overruled the demurrer, because of the mischief which the defendant might effect by using the partnership name, and receiving the partnership debts, without account

(a) *Russell v. Austwick*, 1 Sim. 52.

(b) *Ex parte Agace*, 2 Cox, 316.

(c) *Hood v. Aston*, 1 Russel, 412.

(d) *Anon. Ca. in Ch.* 58. S. C. 16 Vin. Abr. 242.

(e) *Williams v. Bingley*, 2 Vern. 278, n.

(g) *Master v. Kirton*, 3 Vcs. 74.

ing for them. But to entitle a partner under such circumstances to relief, by an interposition of the peculiar preventive process of injunction, he must disclose a case which completely exculpates him from all imputation; for if it appear that he has been guilty of any breach of good faith, a court of equity, if it do not refuse to interfere, will at least hesitate before it interposes in a summary manner. Thus, where on a bill filed by one partner against his copartner, imputing acts of misconduct, and praying a dissolution, and an injunction against receiving debts, or drawing, or accepting negotiable securities, the charges of misconduct being denied, and it being in consequence doubtful whether the partnership could be dissolved, the Court of Exchequer refused an injunction before answer, and in doing so, the court was, in a great measure, governed by the fact that the plaintiff had taken away the partnership books, an act which deprived him of any claim to its favour. (a) And it has been decided, that a court of equity will not, on the application of the executor of a deceased partner, restrain the surviving partners from using the name of the deceased in the firm of their trade, because, by continuing his name in the partnership firm, no liability can be entailed upon his estate; and although it may be a fraud upon the public, yet that circumstance will not entitle the executor to an injunction. (b) Where a party has paid a deposit on a scheme which turns out to be a mere bubble, he may sustain a bill in equity to recover it back. (c)

The Court of Chancery will also entertain a bill for the specific performance of an agreement for a partnership. In a case which came before Lord *Hardwicke* (d), his lordship is represented to have said, that if two partners enter into an agreement to carry on a trade together, and it be specified in the agreement that articles shall be drawn up pursuant to it, and before they are prepared the agreement is abandoned by one of the partners, upon a bill brought by the other for a specific performance, it ought to be decreed, notwithstanding the agreement was in relation to a chattel interest. (e) However, to entitle the

(a) *Littlewood v. Caldwell*, 11 Price. 97.

(b) *Webster v. Webster*, 3 Swanst. 490. n.

(c) *Green v. Barrett*, 1 Sim. 45.; and see *Colt v. Wollaston*, 2 P. Wms. 154.

(d) *Buxton v. Lister*, 3 Atk. 383.

(e) See also *Anon.* 2 Ves. sen. 629.

complainant in such a case to a specific performance, it seems generally to be essential that the partnership contract should be of some definite duration; for, if it be in the power of the defendant to render the decree abortive by an immediate dissolution of the partnership, the court will not interfere. For instance, if three persons engage in partnership for seven years, with a covenant, that if either of them, after the expiration of that term, continue to carry on the trade, either alone, or in partnership with any other person, until one or more of the parties shall have a legitimate or illegitimate son, who attains the age of sixteen, and whom the father, by writing or by will, desires to have introduced into the business, the party continuing the trade shall take such son apprentice for five years, and, when he attains twenty-one, shall admit him as a partner, but not until twenty years after the date of the agreement; a court of equity, it has been determined, will not compel a performance of such agreement upon a bill filed by an illegitimate child to be admitted an apprentice, in pursuance of an appointment by his father; because, were a specific performance of the agreement decreed, the partnership would be dissoluble *instantly* at the will of either party. (a) As a general proposition, however, this distinction between the definite and indefinite limitation, in point of endurance, of a partnership contract, must be received, it is presumed, not without qualification. In many such cases, though the partnership could be immediately dissolved, the performance of the agreement (like the execution of a lease after the expiration of the term) (b), might be important, as investing the party with the legal rights for which he contracted. Where the specific performance of such an agreement is decreed, the court will not direct an account of the profits of the trade from the time the party ought to have been admitted, for that would, in effect, be awarding damages for not admitting him earlier; and whatever he was entitled to in that respect the

(a) *Hercy v. Birch*, 9 Ves. 357. In the late cases of *Vansandau v. Moore*, and *Kinder v. Taylor*, Lord *Eldon* repeatedly stated the settled doctrine of the court to be, that a specific performance of a contract for a partnership would be decreed, provided the partnership were to continue for a certain time, but that the court would not assist in executing the contract, if the partnership could be dissolved at a moment's notice.

(b) *Nesbitt v. Meyer*, 1 Swanst. 226. See *Downham v. Mathews*, cited in *Doddington v. Hallett*, 1 Ves. sen. 497.



plaintiff might have recovered, if he had availed himself of his legal remedy. (a)

Courts of equity will likewise interfere where a breach of any of the covenants contained in the articles of partnership has been committed, if the breach be so important in its consequences as to authorise the party complaining to call for a dissolution of the partnership. One case of constant occurrence, falling under this head of equitable relief, is that of a partner raising money for his private use on the credit of the partnership firm: in a case so circumstanced, the court interposes, because there is a ground for dissolving the partnership; but then the impending danger must be such, there must be that abuse of good faith between the members of the partnership, that the court will try the question, whether the partnership should not be dissolved in consequence. (b) Thus, where it has been covenanted that all contracts entered into by any of the firm, and all checks, bills, and receipts for money, should be signed in the joint names of all the partners, a court of equity will restrain one partner from entering into any engagement in the name of "himself and company," or "himself and partners," or will dissolve the partnership. (c) Were the court not to lay down this rule for its guidance, separate suits might be successively instituted, praying for perpetual injunctions in respect of the breach of each particular covenant, which is a species of jurisdiction the court has never decidedly entertained. (d) So, if one partner exclude another from the benefits of the concern, the court will interfere and dissolve the partnership; and it assumes a jurisdiction on this ground, that if the partners will not allow the partnership to be carried on in the manner in which it ought to be, it is a reason for putting an end to it altogether. (e) Neither will a court of equity assist in the management of the affairs of a company during its existence; but if a sufficient case is made out to justify its interposition, it will appoint a manager in the *interim*, for the purpose of winding up and putting an end to the concern. (g) But although the general principle of the court is not to interfere in a partnership concern unless the bill prays a dissolution, yet there are cases of partnerships for a term of years, in which it has been said the court will interpose during

(a) Anon. 2 Ves. sen. 629.

(b) Marshall v. Colman, 2 Jacob & Walk. 268.

(c) Id. Ibid.

(d) Id. Ibid.

(e) Per Lord Eldon, Kinder v. Taylor, MSS.

(g) Carlen v. Drury, 1 Ves. & Bea. 154. Waters v Taylor, 15 Ves. 10.

the term, notwithstanding a dissolution be not prayed. Thus, where some of the members of a partnership or company seek to embark one of their body in a business which was not originally part of the partnership concern, and they are unable to show that such partner either expressly or tacitly acquiesced in the proposed extension of the concern, a court of equity would, it is apprehended, restrain them from proceeding in the execution of their intention, without dissolving the partnership or company. (a) So, where a member of a firm neglected to enter the receipt of partnership money in the books, and did not leave the books open for the inspection of the other partner, equity interfered without dissolving the partnership (b); or where there has been a studied, intentional, prolonged, and continued inattention to the application of one partner calling upon the other to observe the contract of partnership, the court will grant an injunction against the breach of it (c); and, in general, circumstances of the latter description must be disclosed, to induce a judicial interference on a breach of the articles of partnership, unless a dissolution be prayed. Therefore, where partners covenanted that their business should be carried on in their joint names, and that all contracts and engagements entered into by any of the parties on account of the trade, and all checks and drafts drawn by them, and all receipts for money paid, should be in the joint names of all of them, and some of the partners afterwards refused to comply with the covenant, and to add the name of the plaintiff to certain contracts entered into by the firm, Lord *Eldon*, on a bill being filed which did not pray a dissolution of the partnership, refused to grant an injunction, on the ground that the covenant had not been infringed for any length of time, and that the application of the plaintiff to have his name added was recent. (d) And where two persons agreed to work a coach from *London* to *Bristol*, the one to provide horses for a part of the road and the other for the remainder; and, in consequence of the horses of one having been taken in execution, the other provided horses for the whole line of road, and claimed the whole profits of the journey; the court, on the application of the debtor under the execution, who alleged that his own horses were ready at the usual times and places, refused to interfere by injunction, and to restrain

(a) *Natusch v. Irving*, Appendix, *post*.

(b) *Goodman v. Whitcomb*, 1 Jacob & Walk. 592.

(c) *Marshall v. Colman*, *ante*.

(d) *Id. Ibid.*

his copartner from continuing to provide horses. (a) Neither will the court interfere by injunction, where the case made in support of it is merely a temptation to the abuse of the partnership property. For instance, in the absence of a covenant of restraint, a partner who has adventured in the concern of one newspaper, will not be restrained from engaging as a partner in the concern of another newspaper; because, although the temptation thereby held out, of using the information obtained at the expense of the one for the benefit of the other, forms a powerful objection to such an engagement, yet inasmuch as the common partner does not necessarily place himself in a situation in which he is required to betray his duty to either concern, the objection seems to be founded on the principle of policy and discretion, against which the parties may protect themselves by contract; and if they omit that precaution, neither law nor equity have a right to impose a restraint which the parties themselves, if they intended it should be imposed, might have expressed. (b) But a partner cannot be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of the trust and confidence he owes to his copartner; where, therefore, he had purchased partnership stock in exchange for his own separate shop-goods, it was held that his partner was entitled to share in the profit of such barter. (c)

Where a bill is filed by one partner in relation to a partnership transaction, the existence of the partnership must be apparent to the court before it will determine the question submitted to its consideration. Therefore (d), where a solvent partner filed a bill against his copartner, who had become bankrupt, and his assignees, praying an account of the joint property, and of the debts upon the footing of the partnership, and the assignees, by their answer, stated that they believed a partnership did not exist, Lord *Alvanley* refused to adjudicate the rights of the parties until the fact of the existence of the partnership was established at law; although, in that case, the whole of the evidence was in favour of the claim of the plaintiff. However, if, after the cause is canvassed, it is perfectly clear that a partnership does exist, an issue will not be directed. In a case of this description, Lord

(a) *Smith v. Fromont*, 2 Swanst. 330.

(b) *Glassington v. Thwaites*, 1 Sim & Stu. 124.

(c) *Burton v. Woolley*, 6 Madd. 367.

(d) *Binford v. Dommett*, 4 Ves. 756.



*Rosslyn*, in refusing an issue, observed, that if the verdict found the parties were not engaged in partnership, he would not allow such a verdict to stand. (a)

Independently of the administration of relief by a court of equity in the cases to which we have alluded, it will, it seems, in some instances, interpose; and, during the continuance of a partnership, appoint a receiver of the joint effects. But to authorise a party to call for the appointment of a receiver of the stock of a subsisting partnership, he must be prepared to show a case of the grossest abuse, and of the strongest misconduct, on the part of the managing partner; for, except under such circumstances, the court will not interfere, inasmuch as the probable result of its interposition is the destruction of the trade. (b) Nor will a receiver be appointed upon a summary application, where there is a covenant to refer, and no attempt has been made to submit the matter in dispute to arbitration. (c) But if, in the ordinary course of trade, any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the court will grant a receiver, because such conduct warrants a dissolution. (d) The principle, indeed, upon which the Court of Chancery interferes between partners, by appointing a receiver, is merely with a view to the relief, by winding up and disposing of the concern, and dividing the produce, but not for the purpose of carrying on the partnership. (e) Therefore, a receiver of a partnership will not be appointed upon motion, unless it appear that the plaintiff will be entitled to a dissolution at the hearing; for otherwise the court might make itself the manager of every trade in the kingdom. (g) And where it seems absolutely necessary that a receiver should be appointed of part-

(a) *Foster v. Hale*, 5 Ves. 322.

(b) *Oliver v. Hamilton*, 2 Anstr. 453. *Milbank v. Revett*, 2 Meriv. 405. In a note to the case of *Glassington v. Thwaites*, 1 Sim. & Stu. 130. it is questioned by the learned reporters, whether the court will ever interfere on an interlocutory application for a receiver or injunction, in the case of a partnership occasioned by the acts of the parties, unless on circumstances clearly established of fraud, entire exclusion, or gross misconduct.

(c) *Waters v. Taylor*, 15 Ves. 10.

(d) *Wilson v. Greenwood*, 1 Swanst. 481. S. C. 1 J. Wilson. 223. See also *Read v. Bowers*, 4 Bro. C. C. 441. *Charlton v. Poulter*, 19 Ves. 148. n. (c).

(e) *Waters v. Taylor*, *supra*.

(g) *Goodman v. Whitcomb*, 1 Jacob & Walk. 589. *Chapman v. Beach*, *ibid*. 594. *Harrison v. Armitage*, 4 Madd. 143.

nership property, the court will always pause before it takes a step likely to be so ruinous to the parties. (a) A court of equity, on an application properly substantiated, will appoint a receiver of a mine or colliery, as well as of an ordinary partnership in trade; because, where persons have different interests in such a subject, and manufacture and bring to market the produce of the land as one common fund, to be sold for their common benefit, it is to be regarded rather as a species of trade or partnership than as a mere tenancy in common in the land. (b) But if the claimant to an equitable interest in such a concern, knowingly suffers great expense and risk to be incurred before he asserts his equitable right, and keeping aloof while the undertaking is hazardous, seeks the interposition of the court only when it is attended with a profitable result, the court will not interfere by appointing a receiver on motion, and it is doubtful whether it would interpose in such a case, even by decree. (c) In particular cases, equity will restrain the improper conduct of a partner without appointing a receiver. (d) Where, by the partnership agreement, the concern was to be managed by a committee, the share of each proprietor dying or retiring, to be first offered to the committee, to be purchased for the general body, it was held that the whole concern could not be sold but with the consent of all; and that where all but two out of thirty-one had agreed, and sold the concern, such sale did not pass the share of such two; but in such a case there need be no previous offer to the committee. (e)

(a) *Waters v. Taylor*, ante. *Peacock v. Peacock*, 16 Ves. 57.

(b) *Jefferys v. Smith*, 1 Jacob & Walk. 298. *Story v. Lord Windsor*, 2 Atk. 630. *Crawshay v. Maule*, 1 Swanst. 518. S. C. 1 J. Wills. 181. *Williams v. Attenborough*, 1 Turner, 73. *Fereday v. Wightwick*, 1 Tamlyn, 250.

(c) *Norway v. Rowe*, 19 Ves. 144. *Senhouse v. Christian*, cited ib. 157.

(d) *Seeley v. Boehm*, 2 Madd. 176.; but see *Smith v. Fromont*, 3 Swanst. 330. and *Glassington v. Thwaites*, 1 Sim. & Stu. 124.

(e) *Chapple v. Cadell*, Jac. 537.

## CHAPTER III.

## SECTION I.

*Legal Remedies for Partners against Strangers.*

IN the foregoing chapter we had occasion to consider the rights of partners as to property in possession, whether personal or real, and also to investigate the legal and equitable remedies to which they may resort for the adjustment of differences arising amongst themselves. We will now proceed to enquire into their rights as to the other great division of things, *viz. choses in action*; and at the same time point out what remedies the law has afforded them for the assertion of such rights, when they are invaded by persons unconnected in interest with them.

Rights of the latter description arise chiefly from the executory contracts partners enter into with third persons. Of the general nature of contracts, of the consideration necessary to a valid promise of the provisions of the statute of frauds upon this subject, and of the manner in which agreements are to be construed, it would be foreign to our present purpose to inquire. With regard to such points, it is immaterial whether there be only two individual parties to the contract, or any greater number; and it is the object of this treatise to point out what is peculiar and characteristic in the transactions of partnerships.

A promise or undertaking to one of several partners in the course of business, is construed by law to be made to all of them, and all are entitled to take advantage of it; whether the promise be express or implied, the legal consequence will be the same. Thus, an agreement to sell a cargo of coals to either of two coal merchants in partnership, would be held a contract with both jointly; in the same manner as the law would raise the implied promise of a customer purchasing a part of the coals from one of them, to be for the benefit of both. In cases of doubt the criterion to determine the nature of the promise, must be the nature of the consideration; if the consideration proceeds from the partnership, the promise will be inferred to be to the members jointly,



and *vice versá*. As for instance, if goods are sold belonging to the partnership, or if goods are bargained for to be paid from the partnership funds, there a joint action would be to recover the price of the first goods, and damages for the non-delivery of the others ; but if work and labour be performed by the separate servant of one partner, or this one partner has paid a sum of money for the repairs of his own dwelling-house, it is clear that he alone is interested in these contracts, and that he alone can sue upon them ; at the same time, though contracts in the course of business with part of a firm are considered as for the benefit of all the members composing it, still the partnership is incapable of treating as a corporation or body politic. It has no continuance independent of the particular individuals of whom it is formed ; rights are not vested in it, but in them ; so that there is no transmission of rights to successions in a mercantile house, and all running agreements with a partnership, we shall presently see, cease when any change takes place by death, the retiring of one partner, or the admission of another, into the set of partners existing at the time the agreements were concluded.

It never could, however, be doubted, that contracts in themselves immoral and illegal afford no right of action, either to the person entering into them or his copartners ; and it is settled that where the knowledge of any particular circumstance vitiates a contract which otherwise would be valid, the knowledge of one is considered as the knowledge of all, as completely as if the circumstance had been actually communicated to them. Thus, an action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners, who resided in *England*, knew nothing of the sale ; for it is a contract by subjects of this country, made in contravention of the laws ; and such a case must be considered in the same light with respect to the whole firm, as if all the partners had lived in *England*. (a) With reference to personal torts, they can seldom be sustained jointly by persons who are united together as partners. Injuries of this description are mostly of a separate nature, affecting only a single individual ; and where this is the case, the injured person can alone assert the remedy

(a) *Biggs v. Lawrence*, 3 T.R. 454. See also *Clugas v. Penaluna*, 4 T.R. 466. *Hodgson v. Temple*, 5 Taunt. 181. *Waymill v. Read*, 5 T.R. 599.

applicable to the injury sustained. However, slander, which is a species of personal tort, may jointly affect partners, if (as by a false representation of their solvency) it have relation to the trade in which they are engaged. It has, therefore, been decided, that if defamatory words be spoken of two partners, affecting them in their trade, they may maintain a joint action for the slander, where it is attended with special damage. (a) But Mr. Serjeant *Williams* has expressed his opinion to be, that the statement of special damage is not a necessary ingredient to the support of the action; for that if the words are actionable, because they are spoken of partners in the way of their trade, a joint action may be maintained, although the partners have not sustained any special damage by reason of the speaking them. (b) And in perfect conformity with this opinion, it has since been held, that where a copartnership is libelled, and the libel contains something which particularly affects the character of one of the firm, a joint action may be maintained against the libeller; and that it is not necessary to show what proportion of interest each partner had in the joint business; nor to set out any special damage. (c) But although partners, in their collective capacity, are furnished with the same remedies which individuals possess for the assertion of their rights, cases have occurred, in which, notwithstanding a loss has been sustained, the law has, of necessity, been compelled to deny a remedy to redress it. The class of cases to which allusion is made is that in which the same person being engaged in two different firms, a contract is made by the one concern with the other, or the negotiable paper of the one gets into the possession of the other concern. Where such an occurrence takes place, damages cannot be recovered at law for a breach of the contract, nor can payment of the negotiable instrument be enforced by any legal remedy. The individuality of the person of the common partner cannot be severed; no man can contract with himself, nor can he bind himself, in the society of one set of persons to another in which he is also a partner. In

(a) *Cook v. Batchellor*, 3 Bos. & Pul. 150. *January v. Spires*, cited *ibid.* See also *Maitland v. Goldney*, 2 East, 426. *Worton v. Smith*, 6 B. Moore, 110. *Solomons v. Medex*, 1 Stark. 191. *Furnival v. Weston*, 7 B. Moore, 356.

(b) See the note on *Coryton v. Lithebye*, 2 Saund, 117. a. *Bromage v. Prosser*, 4 B. & C. 247. It is actionable to say, of a banking partnership, that they have suspended payment, *Foster v. Lawson*, 3 Bingh. 452.

(c) *Forster v. Lawson*, *supra*.

an action founded, either on a breach of the contract or on the security, he must join, although at the same time, and in an ordinary case, he has incurred that responsibility which subjects him to be called upon to fulfil the identical engagement he himself must seek to enforce. It would, indeed, be an anomaly in the law, if the same person could, in the same suit, sustain the two-fold character of a plaintiff and a defendant; or, in different words, could, in concurrence with others, attempt to enforce reparation for a breach of contract jointly committed by himself and those with whom he has associated. In equity, perhaps, the contract and the negotiable security, if the latter have the appropriate stamp, might be enforced as equitable agreements (*a*), but neither of them can be made the foundation of an action at law. (*b*) Thus, where one of three partners made a promissory note, payable to himself and partners, who indorsed it to another firm, in which one of the original payees was a partner, on assumpsit by the indorsees against one of the indorsers, the latter pleaded in bar that one of the plaintiffs was liable with him as an indorser, and on special demurrer, this plea was held good. (*c*) So, in a later case, the Court of Common Pleas, on the ground of the legal disability of a partner to contract with the firm, held, that the partners in one house of trade could not maintain an action against the partners in another house of trade, of which one of the partners in the plaintiffs' house was also a member, for transactions which took place while he was a partner in both houses. (*d*) And the objection, which goes to the root of the contract, applies as forcibly against the representatives of the common partner.

(*a*) See dict. of Lord *Eldon*, in *Mainwaring v. Newman*, 2 Bos. & Pul. 120. See also dict. of *Gibbs C. J.*, in *Bosanquet v. Wray*, 2 Marsh. 234.

(*b*) *Id. Ibid.* See also *Moffat v. Van Milligen*, cited 2 Bos. & Pul. 120. *De Tastet v. Shaw*, 1 B. & A. 664. *Neale v. Turton*, 4 Bingh. 149. *Teague v. Hubbard*, 8 B. & C. 345. S. C. 2 Mann. & Ryl. 369. *Harvey v. Kay*, 9 B. & C. 356. In a late case, where A, a partner in two concerns, was indebted to one of them, and before the dissolution of that partnership, and unknown to his partner in the other concern, indorsed a bill and paid over money belonging to the latter concern in discharge of the private debt due from himself to the former partnership, and immediately afterwards indorsed the same bill to a creditor of that partnership: the last-mentioned partnership having been dissolved, it was held that neither A and his partner in the one concern, nor their assignees (they having become bankrupts), could maintain trover against the members of the other concern for the bill, or assumpsit for the money paid by A out of the funds of the one in discharge of his private debt due to the other partnership. *Jones v. Yates*, 9 B. & C. 532.

(*c*) *Mainwaring v. Newman*, *supra*.

(*d*) *Bosanquet v. Wray*, *supra*.



It, therefore, can make no difference, whether the action be brought in the lifetime or after the decease of the latter, because, as no legal contract ever existed, it cannot, in any event, be rendered available at law. (a) But the surviving partners of the one house may sue the surviving partners of the other house, upon transactions which have taken place subsequently to the decease of the common partner; for, as regards such transactions, they sustain merely the character of strangers, possessing no identity of interest. (b)

Analogous in principle, is the case of one firm, partly composed of a common partner, attempting to enforce a security against a stranger, after satisfaction for the security has been obtained by the other firm. In such a case, the money received by the one firm, being paid and accepted in satisfaction of the security, the common partner will not be permitted to contravene the receipt of it for that purpose, nor will he be allowed to sue upon a bill, which as regards himself has been already satisfied, although he be ignorant of the circumstances which constitute the satisfaction. Therefore, where A was a partner with B, in one mercantile house, and with C in another, and, after the former house had indorsed a bill of exchange to the latter, B, acting for the firm of A and B, received securities to a large amount from the drawer of the bill, upon an agreement by B, that the bill should be taken up and liquidated by B's house, and, if not paid by the acceptors when due, should be returned to the drawer, the Court of King's Bench held, that the deposited securities being paid, and the money, therefore, being received by B in satisfaction of the bill, A was bound by this act of his partner B in all respects, and therefore could not, in conjunction with C, his partner in the other house, maintain an action, as indorsees and holders of the bill, against the acceptors, after such satisfaction received through the medium of, and by agreement with B, in discharge of the same. (c) And it is a good defence to show that one of several plaintiffs cannot recover, notwithstanding he may have been guilty of fraud against the rest. Thus, where one of three partners, unknown to the others, undertook to provide for a bill of exchange, drawn by the three upon and accepted by a fourth person, although such engagement was made in fraud of his copartners, yet it was held that no action

(a) *Bosanquet v. Wray*, 2 Marsh, 319. S. C. 6 Taunt. 597.

(b) *Id. Ibid.*

(c) *Jacaud v. French*, 12 East, 317.

could be maintained upon the bill against the acceptor. (a) So, where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted the same, upon condition that the drawer should provide for it when due, it was held that as he having failed in performing the condition could not have sued the defendant, his partners being bound by his acts could not maintain a joint action. (b) Neither can partners assert a right accruing to them in their collective characters, where some of the members of the firm are under a legal incapacity to sue. For instance, if one of two partners, though an Englishman, be resident and carry on trade in an enemy's country, a joint contract entered into with the firm cannot be enforced by the other partner, because his copartner, residing under the allegiance and protection of an hostile state, for all commercial purposes, is to be considered to all civil purposes as much an alien enemy as if he were born there. (c) But if his residence in an enemy's country be for the purpose of a trade licensed by the government of this country, it does not constitute a disability. (d) Neither is the legal right of partners affected by the residence merely of one of the members of the firm in a hostile country, if such residence be unconnected with an adherence to the enemy. (e) Where one of three partners, the other two being neutrals, obtained a licence as broker on behalf of several British merchants to trade to an enemy's country, and before action brought the two neutrals became enemies, it was held that the broker might maintain an action on a policy of insurance, to recover the value of the joint interest of the three. (g)

Partners sometimes seek to enforce a guarantee given to secure the repayment of an advance to be made by the firm. In such a case the action must necessarily be brought by all the partners to whom the guarantee is given, and by whom the advance is made. And where a contract of that description is apparently

(a) *Richmond v. Heapy*, 1 Stark. N.P.C. 202. *S. P. Johnson v. Peck*, 3 Stark. on Evid. 1068. *S. C.* 3 Stark. N. P. C. 66.; and see *Hunter v. Richardson*, 6 Madd. 89.

(b) *Sparrow v. Chisman*, 9 B. & C. 241.

(c) *M'Connel v. Hector*, 3 Bos. & Pul. 113. See also *O'Meally v. Wilson*, 1 Campb. 482. *Albrecht v. Susman*, 2 Ves. & Bea. 323.

(d) *Ex parte Baglehole*, 18 Ves. 525. *S. C.* 1 Rose, 271. See also *Usparicha v. Noble*, 13 East, 332. *Flindt v. Scott*, 5 Taunt. 674.

(e) *Roberts v. Hardy*, 3 Mau. & Selw. 533.

(g) *De Tastet v. Taylor*, 4 Taunt. 233.

entered into in favour of one partner only, yet if in fact it be intended as an indemnity to the firm in respect of an advance to be made by them, a joint action may be maintained. Thus, in the late case of *Garrett and another v. Handley* (a), which was an action on a guarantee by two as the survivors of a firm of three partners, it appeared that the guarantee was addressed to one of the partners only, but evidence was produced which established that the advance, to secure which the guarantee was entered into, was made by the firm, and that the guarantee was given for their joint benefit and not to indemnify the single partner only; it was objected at *nisi prius*, and afterwards insisted upon on a motion to enter a nonsuit that there was a misjoinder, for as the guarantee was in terms given to one partner, to whom alone the promise could be construed to have been made, the action should have been brought by him only; but the Court of King's Bench held, that as the guarantee was proved to have been intended for the benefit of the firm, the action was properly brought by the surviving partners. And, under such circumstances, it is not competent to the partner, to whom the guarantee may have been addressed, to treat the advance as one made by himself on his individual account, and in that character to support a separate action. This was determined in a previous action on the same guarantee, and in which the plaintiff declared that in consideration that he would advance a sum of money to A B, the defendant promised that provision should be made for repaying the plaintiff. At the trial it appeared that the defendant had given to the plaintiff the guarantee stated in the declaration, and that the latter was a partner with two other persons in a banking-house, and that the firm had advanced the money, and charged A B in account with the same; and it was held that the averment in the declaration that the plaintiff had advanced the money was not sustained by the proof, there being no evidence to show that the money had been advanced to the plaintiff by the firm, and by him to A B. (b) It is not to be collected from either of the two preceding cases, nor was it in fact necessary to determine whether the partner to whom the guarantee was actually given could have maintained a separate action upon it, provided his declaration so truly and correctly stated the facts as not to have been open to the objection of a variance between

(a) 4 B. &amp; C. 664.

(b) *Garrett v. Handley*, 3 B. & C. 462.



the allegation and the proof. But judging from analogy to the rule applicable to a policy of insurance, which allows the action to be brought either by the party for whose benefit it was effected, or in the name of him who effected it (*a*), it would seem that that partner, as being the party with whom the contract was made, might have supported such an action.

Actions are also not unfrequently brought by partners against a third person, who has guaranteed the honesty and fidelity of a clerk or servant in their employ. In such cases, attempts have been made to establish the guarantee, as an indemnity to the *house* of trade, rather than to the members composing it. But, after many decisions upon the subject, the principle applicable to such instruments seems to be this: that, as every partnership ceases to be the same if any alteration is made in the parties of which it is composed, so the prospective operations of a guarantee given to a partnership will cease upon any change, either by the death or withdrawing of any of the partners, or the addition of a new one, unless the guarantee itself contain some provision contemplating such change, and continuing its operation to the succeeding partnership. In the first case affording a solution of this principle, it was decided that a bond given to a sole trader, as a security for the conduct of his clerk, did not render the surety responsible for any defalcation committed by the clerk after the obligee had entered into partnership with a third person. (*b*) So, a promise to three partners to pay for goods to be furnished to a particular individual, does not extend to goods furnished by two of them after the third partner has retired from the business. (*c*) The responsibility of the surety likewise terminates on the death of any one of the partners with whom the engagement of suretyship was formed. (*d*) And, if the frame

(*a*) See *Bell v. Ansley*, 16 East, 141.; and the observation of *Bayley J.*, 4 B. & C. 666. In an action on a policy, a material variance between the interest averred in the declaration and that proved at the trial will be a ground of nonsuit. Thus, where the interest was alleged to be in a single person, and the policy purported to be made on his account, whereas in fact several were jointly interested, and the policy was made on their joint account, the variance was held to be fatal. *Bell v. Ansley*, *supra*. And see *Cohen v. Hannam*, 5 Taunt. 101. *Carruthers v. Sheddon*, 1 Marsh, 416. S. C. 6 Taunt. 14.

(*b*) *Wright v. Russell*, 3 Wils. 530. S. C. 2 Bl. Rep. 934.

(*c*) *Myers v. Edge*, 7 T. R. 254.

(*d*) *Strange v. Lee*, 3 East, 484. *Weston v. Barton*, 4 Taunt. 673. S. P. In a modern case, where a person, by bond, became surety for such sums as should be

and constitution of any society or partnership be otherwise materially altered, the prospective effect of a guarantee, previously given, will cease. Thus, where a bond had been given by the defendant's testator to the plaintiff and several other persons, since deceased, governors of the Society of Musicians, *payable to them and their successors as governors*, conditioned for the fidelity of one J. H. as their collector, and the society was afterwards incorporated, it was held, that the executors of the obligor were not liable, since, after the charter of incorporation, the society constituted a perfectly new body of persons, in the judgment of the law. (a) But an engagement may be framed to meet a change or alteration in the partnership, and be afterwards binding upon the person who may guarantee either the payments or fidelity of another. This was expressly laid down by Mr. Justice Lawrence (b), who said, "A bond may be drawn with the condition now insisted on in argument, for the obligor to be answerable, not only to the present, but to all future partners in the house: but that has not been done here." The bond of indemnity in the case of *Barclay v. Lucas* (c) was regarded by the Court of King's Bench as an engagement of that description. There the court considered the undertaking as having been given to the house, and not to the individual members of it, and, therefore, they held, that it was not discharged by any change of partners. But how far the wording of the engagement in that case fairly admitted the construction put upon it by the court, is a question that has admitted of some doubt. (d) The same point came under discussion in a later case (e), in which a bond had been given to the plaintiff and four others, trustees for the *Globe Insurance Company*, conditioned for the honesty and faithful service of one A B to the *said Company*, and it was determined, that this was an engagement for the faithful service of the party to such persons, who, for the time being, should constitute the *Globe Insurance Company*. In conformity

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advanced to meet bills drawn by two partners or either of them, it was held, from the language of the condition, that its operation was confined to debts contracted during the joint lives of the partners. *Simson v. Cooke*, Bingham 452.

(a) *Dance v. Girdler*, 1 New Rep. 34.

(b) *Strange v. Lee*, 3 East, 491.

(c) 1 T. R. 291. note (a). See *Kipling v. Turner*, 5 B. & A. 261.

(d) See the judgment of Lord *Ellenborough* in *Strange v. Lee*, *supra*.

(e) *Metcalf v. Bruin*, 12 East, 400. S. C. 2 Campb. 422.

with the principle established by the preceding cases, it has been decided, that where a guarantee or security is given on the behalf of one person, or of certain persons, constituting a partnership firm, and another or others are afterwards introduced, or other material change takes place, after which the parties, to whom the security is given, continue their dealings, knowing of the change, there is an end of the security. (a) In a late case it was doubted whether a mortgage to partners, their heirs and assigns, to secure debts due or to become due to them or the survivor, was available to a new partnership formed by the addition of another, in whose time the debt accrued. (b) But where title-deeds are deposited by way of security with a firm, upon a verbal agreement, the deposit may be extended by a subsequent verbal agreement for the security of a new sum upon a change of partners. (c) And in a recent case, an agreement, by way of deposit of title-deeds, with a firm of five, one of whom was a nominal partner only, was extended by subsequent agreement to the actual partnership of four. (d)

In actions *ex contractu*, or actions founded upon contract, the general rule is, that if the cause of action be joint, all the joint contractors, if living, must concur and join in bringing the action (e); or if some are dead, the action must be brought by the survivors. (g) Partners, therefore, in actions instituted to

(a) *Bellairs v. Hebsworth*, 3 Campb. 53.

In *Parker v. Wise*, 6 Mau. & Selw. 239., which was an action of debt on bond, the defendant pleaded that, after the making of the bond, the partnership of obligees was dissolved, and a new partnership formed, by the retiring of one of the old partners and admitting a new partner, with which new partnership the parties for whom the defendant was surety, with the privity of the retired partner, kept an account, and that at the time of the dissolution of partnership the sum secured was due from those parties to the partnership for such overdrawings, but the partnership did not at any time demand payment of it, but, on the contrary, at and after the dissolution, discharged them from making such payment, and consented that the balance should be, and it was transferred to the account between them and the new partnership, and became incorporated in their account; and it was held on demurrer that the plea was bad, for an assignment of a *chose in action* is no discharge of an obligation.

(b) *Ex parte Watson*, 19 Ves. 459.

(c) *Ex parte Kensington*, 2 Ves. & Bea. 79. *Ex parte Lloyd*, 1 Glyn & James. 389.

(d) *Ex parte Alexander*, 1 Glyn & James. 409.

(e) *Lambert's case*, Godb. 244. *Cabell v. Vaughan*, 1 P. Wms. Saund. 291.

b. (4.)

(g) *Webber v. Tivill*, 2 Wms. Saund. 122. (1).



enforce contracts made with them, must all join. This principle is bottomed on practical convenience, to prevent a multiplicity of actions in a case in which the rights of the parties are capable of adjustment in a single suit : indeed, if several were allowed to bring separate actions for one and the same cause, the court itself would be in doubt for which of them to give judgment. (a) It may also be beneficial to the defendant to have the action brought by all the parties interested, for he may possibly have a defence against them all which may not be available against one or more of them. (b) The rule therefore established is, that all those who are alive must join, and if they do not, the plaintiff will be nonsuited or have a verdict against him. (c) And where A declared upon an account stated with him of monies due to him and a third person, after verdict judgment was arrested, on the ground that the promise, whether express or implied, must, in point of law, be considered as made to both the persons whose debt it was, and therefore they ought to have joined in the action. (d) The same principle was recognised and acted upon in a late case. (e) There a father had opened a bank, apparently on the joint account of himself and his infant son, in whose names the accounts with the customers were headed in the banking books; and it was determined by the Court of King's Bench, that the father could not sue alone for the balance of an account overdrawn by a customer of the house, without giving distinct proof that the son, though a minor, had neither property in the banking fund, nor a share in the business as a partner. And it has been ruled, that if a trader have a clerk at a fixed salary, whom he holds out to the world as a partner, an action upon a bill of exchange, drawn in the name of the trader and clerk, cannot be maintained by the trader alone. (g) So

(a) *Per Lord Kenyon*, *Anderson v. Martindale*, 1 East, 497. See also *Slingsby's* case, 5 Rep. 18.

(b) *Per Bayley J.*, *Petrie v. Bury*, 3 B. & C. 356. *Vide* also *Ex parte Marsh*, 2 Rose, 239. *Ex parte Browne*, *Ib.* n. But the doctrine of equitable mortgage by deposit has been refused to be extended to subsequent advances after a legal mortgage. Lord *Eldon* observed, that there never was a case where a man having taken a mortgage by a legal conveyance was afterwards permitted to hold that estate as further charged, not by a legal contract, but by inference from the possession of the deed. *Ex parte Hooper*, 19 Ves. 477. 1 Meriv. 7. 2 Rose, 328.

(c) *Cabell v. Vaughan*, 1 Wms. Saund. 291. f. 1 Chitt. Rep. 71. 2 Stra. 820.

(d) 7 Mod. 116. Yelv. 177. See also *Vernon v. Jeffreys*, 2 Stra. 1146. *Garrett v. Handley*, 3 B. & C. 462.

(e) *Teed v. Elworthy*, 14 East, 210.

(g) *Guidon v. Robson*, 2 Campb. 302.

where, at the time of forming a joint stock company, the names of the plaintiffs were entered in a book as original subscribers. and scrip receipts issued by the directors, which they afterwards sold before the company's deed was executed, and which was never signed by the plaintiffs, it was held, that they must still be deemed partners in the concern, and could not therefore recover on a note by the defendant, payable to themselves on account of the company. (a) The existence of this rule was acknowledged, and the reason of it admirably explained, by Lord C. J. *Eyre*, in his elaborate judgment in the case of *Scott v. Godwin* (b): "There is," said that learned judge, "an essential difference between the cases, where the objection is that other persons ought to be made co-defendants, and where it is that there are not the proper parties plaintiffs in the suit. Many plaintiffs can have but one right, having but one interest, and one cause of action, which ought to be, and is, indivisible, admitting of but one satisfaction. But if in the nature of the thing, if on principles of law or authorities, it could be that a man should derive a several interest out of a joint obligation to himself and others, and that plaintiffs could sue separately for their portions of one right, it is most obvious that it must vex and harass defendants extremely. I take it to have been solemnly adjudged in several cases, and to be the known received law, that one co-covenantee, one co-obligee, or one joint contractor by parol, cannot sue alone (c); a breach of a joint contract with two or more cannot be joint and several. In the last case it is common experience, that where a joint contract appears in evidence on the general issue, the plaintiff is nonsuited; and there are many cases in the books, in which it has been held to be error, for one co-obligee, or one co-covenantee to sue alone." Nor is it a sufficient answer to the objection, arising from a non-joinder of parties, that the partner omitted is either bankrupt or an infant. If a bankrupt, the solvent partner must sue jointly with his assignees, upon whom, by law, the interest of the bankrupt partner in all contracts devolves (d): in such a case, were the action brought

(a) *Perring v. Hone*, 4 Bingham, 20.

(b) 1 Bos. & Pul. 67. See also *Nathan v. Buckland*, 2 B. Moore, 153.

(c) *Slingsby's case*, 5 Rep. 18. Where a covenant is made with three persons, and one only seals the deed, but the others do not expressly dissent to it, an action cannot be sustained upon the covenant by that one alone. *Petrie v. Bury*, 3 B. & C. 353.

(d) *Thomason v. Frere*, 10 East, 418.

in the names of all the partners, the bankruptcy of the one might be pleaded in bar. (a) And if the partner omitted be an infant, his minority forms no excuse for his not being joined; for he, as well as an adult, falls equally within the rule, requiring all those who are legally interested in the subject matter of the action to join as plaintiffs. (b) But with respect to dormant partners, it seems to have been considered, that an action on a contract may be maintained either in the name of the persons with whom the contract was actually made, or in the name of the parties really interested. Therefore a dormant partner may join in an action instituted by the firm, as being one of the parties really interested in the suit (c), but his nonjoinder does not appear to be a ground of nonsuit, or to be objectionable in any way. (d) Thus, if the ostensible proprietor of materials enter into a contract for work to be done thereon, it is not necessary that, in an action brought on the contract, another, who has secretly purchased a share of him, but is no party to the contract, should be joined as a co-plaintiff. (e) So, where two brought an action as partners (with whom the defendant had dealt), and at the trial it appeared that, at the time of the contract, a third person, not joined, was a dormant partner, and that he had since withdrawn from the firm, Lord *Kenyon* refused to nonsuit the plaintiffs. (g) However, if a dormant partner join, it does not form any objection at the trial, that the defendant is thereby deprived of his right of set-off against the ostensible partners, because the statutes of set-off do not prevent the action from being maintainable in the names of all the parties interested. If the introduction of the dormant partner, as a plaintiff, make any difference in fact to the defendant, by affecting his right of set-off, the court in which the action is commenced would, perhaps, on application, grant him relief. (h) Neither is it requisite to the maintenance of an action commenced by the real members of a firm, that a nominal member

(a) *Eckhardt v. Wilson*, 8 T. R. 140. 12 Mod. 446.

(b) *Teed v. Elworthy*, 14 East, 211.; and see the cases there cited by Mr. *Toppling* in argument.

(c) *Skinner v. Stocks*, 4 B. & A. 427. See *Steel v. Western*, 7 B. Moore, 31.

(d) *Lloyd v. Archbowle*, 2 Taunt. 324.; and see *Brassington v. Ault*, 2 Bingham, 177.

(e) *Mawman v. Gillett*, 2 Taunt. 325. n.

(g) *Leveck v. Shaftoe*, 2 Esp. N.P.C. 468.

(h) *Skinner v. Stocks*, *supra*.



should be joined, if it be made to appear that he has no interest as a partner (a) : for, although, as against creditors, a nominal partner is to be considered *bonâ fide* a partner, yet that is not the case with respect to debtors. (b) Therefore, where an action was brought by a father, whose son's name was introduced into the business as a copartner, on an objection that the father could not sue alone, it was held that the son might be called to show that he had no interest, and consequently that the action was rightly brought in the name of the father only. (c) And in a late case it is stated to have been held, that an ostensible partner, who is proved not to be a *bonâ fide* partner, need not join in an action on a contract with the supposed firm. (d)

Although the cause of action be originally joint, the party himself who contracts with the firm may, by his own acts, render it so far separate as to entitle a single member to sue alone. Thus, where three persons employed the defendant to sell some timber for them, in which they were jointly interested, and the defendant paid to two of them their proportionate shares, and took receipts, it was objected, on an action being brought by the third party for his share, that as the employment was a joint employment by three, one alone could not bring his action ; but Lord *Mansfield* ruled that where there had been a severance one alone might sue. (e) So where the action was for the use and occupation of a house, and it appeared that the house was the property of six several tenants in common, to all of whom, except the plaintiff, the defendant had paid his rent, and the action was for his share of the whole rent ; it was objected that one tenant in common alone could not bring this action, that all ought to join ; but Lord *Mansfield* overruled the objection, and the plaintiff recovered. (g) And the general rule applies only where the object of the partners in suing is the enforcement of an original debt or duty to the firm ; for if, by any subsequent arrangement with the debtor, the nature of the debt or duty is changed, and a new and independent cause of action, in respect of it, accrues to an indi-

(a) *Harrison v. Fitzhenry*, 3 Esp. N.P.C. 238.

(b) *Ex parte Alexander*, 1 Glyn & James, 409.

(c) *Parsons v. Crosby*, 5 Esp. N.P.C. 199. See also *Teed v. Elworthy*, 14 East, 210. *Page v. Hiscox*, cited *Ibid. arg.* *Glossop v. Colman*, 1 Stark. N.P.C. 25.

(d) *Davenport v. Rackstraw*, 1 Carr. & Pay. 89.

(e) *Garret v. Taylor*, 1 Esp. N.P. 144. See also *Judgment of Lawrence J.* in *Sedgworth v. Overend*, 7 T. R. 279.

(g) *Kirkham v. Newstead*, 1 Esp. N.P. 145.

vidual partner, he alone can enforce it. Therefore, where one partner, in the name of himself and his copartner, executed a deed of composition, whereby, in respect of a partnership debt, he agreed to take from the debtor a stipulated composition, and the defendant covenanted to pay the amount of the composition by instalments to the parties to the deed, or to their respective partners; in an action of covenant for nonpayment of an instalment by the partner alone who subscribed the deed, to which the defendant demurred, the court held that the action was properly brought, for the right of action being constituted by the deed, and the other partner not being a party to it, he could not join in covenant. (a) So, a declaration of the acting partner, made contemporaneously with the formation of a contract, being evidence against all the partners, may disable them from jointly asserting a right which ought, in reality, to have accrued to them in a collective character. Therefore, where a contract was made by one of several partners, in his individual capacity, who, at the time, declared that the subject-matter of the contract was his property alone, it was held that the partners could not sue jointly upon it. (b) Where, in an action of ejectment, it appeared that A demised but that he gave receipts for the rent in his own name and those of B and C, his partners, it was held that a new tenancy was not thereby created, but that A might recover on a demise stated to have been made by himself alone. (c)

A misjoinder, or the joinder of more persons in an action than those with whom the contract was actually made, is as objectionable as a nonjoinder, the rule of law upon this subject requiring that all, but no more than the parties really interested in the contract at the time it was entered into, should join. Therefore, if one of two attorneys in partnership is appointed, and singly act as replevin clerk to a sheriff, he alone can maintain an action for the expense of preparing a replevin bond, although the bond was executed in the office where the attorneys carried on their joint business; and if his copartner join with him in the action, they will be nonsuited. (d) So if a firm admit a new member upon an agreement

(a) *Metcalf v. Rycroft*, 6 Mau. & Selw. 75. See *Petrie v. Bury*, 3 B. & C. 353. In *Biggs v. Fellows*, 2 Mann. & Ryl. 453., *Holroyd J.* said, "One partner may take a security for both in his own name, and he will be a trustee."

(b) *Lucas v. Delacour*, 1 Maul. & Selw. 249.

(c) *Doe v. Baker*, 2 B. Moore, 189.

(d) *Brandon v. Hubbard*, 4 B. Moore, 367. S. C. 2 Brod. & Bingh. 11.

that he shall be deemed a partner from a previous day, an action for a partnership debt, contracted before the day when the new member was actually admitted, must be brought in the name of the old firm; and if the new member be joined, a nonsuit will be the consequence, since with him there was not any contract. (a)

The joinder of all the parties, to whom the cause of action accrued, may be rendered impossible, by the subsequent death of one or more of the partners. In such a case the legal remedy to recover damages for the breach of a contract, or to enforce payment of a debt, vests in the surviving partners, and not in them jointly with the executors or administrators of the deceased partner. (b) And although the right of action which, in such an event, is transferred to the survivors, is to be exercised not only for the benefit of themselves, but likewise for that of the representatives of the deceased, yet the executor or administrator of the latter must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered, since at law the claim cannot be effectually enforced. Formerly it was considered that a surviving partner might declare generally upon a contract entered into with him and his deceased partner, as upon a contract made with himself alone (c); but the rule is now different. For, as it would be a variance and a good defence upon the general issue, were one of two joint contractors to sue, both being alive, so it seems to be reasonable, that where a surviving joint contractor sues, the fact of his being survivor should appear in the declaration. (d)

(a) *Wilsford v. Wood*, 1 Esp. N. P. C. 182. See also *Osborne v. Harper*, 5 East, 225.

(b) *Anderson v. Martindale*, 1 East, 497. *Martin v. Crompe*, 1 Ld. Raym. 340. S. C. 1 Show. 189. Com. Dig. Tit. Merchant (D). Vin. Abr. Tit. Partner (D).

(c) *Ditchburn v. Spracklin*, 5 Esp. N. P. C. 51.

(d) *Jell v. Douglas*, 4 B. & A. 374. *Webber v. Tivill*, 2 Wms. Saund. 121, n. 1. *Israel v. Simmons*, 2 Stark. N. P. C. 356. *Fitzgerald v. Boehm*, 6 B. Moore, 332. A distinction subsists between cases of express contract, for instance a sale of goods by a firm, and the contract which the law implies in favour of partners who are the indorsees *in blank* of a bill of exchange. In the former case, if one of the members of the firm die subsequently to the making of the contract, it is necessary that that fact should be stated in the declaration, because the *gist* of the action is founded on a previous contract, and another cannot be implied. But where a bill of exchange is indorsed *in blank* to a firm it becomes transferable by delivery, and in case one partner dies or withdraws from the firm, the others become the holders of such an instrument in point of law, and it is quite clear that they may sue in their own right as indorsees, as it is not incumbent on them to prove their joint title to sue on the bill by showing that they were partners at the time of such indorsement, or by proving a transfer to them jointly. If, however, a bill of exchange be indorsed



But in an action at the suit of a surviving partner, he may include a count for a debt due to himself in his own right. (a) And where money is owing to two partners, and after the death of one it is paid to a third person, the survivor may maintain an action for money had and received to his use. (b) On the death of the last surviving partner his executor or administrator alone can sue, and the personal representatives of the partner who first died ought not to be joined.

We have before stated that public companies, not incorporated, are considered in the nature of ordinary partnerships, and consequently the rules and doctrines which regulate the joinder of parties in an action brought by the one, must apply with equal force to the other. When, therefore, such a company sues for the recovery of its rights, the adverse party may, generally speaking, avail himself of the objection, that there are many members who are not joined as plaintiffs, in the same manner as a defendant, in an action instituted by a common partnership, may do. (c) The general rule in both cases must be the same; but inasmuch as companies would constantly be exposed to great difficulty in establishing their rights, if it were incumbent upon them to join all the members in a suit, they are in most instances, either by their own compact, or by the act of the legislature, relieved from the necessity of doing so. Thus, on the formation of a company, the adventurers in it may, as it seems, lawfully stipulate that two of them only shall carry on the projected trade, and that all actions on the behalf of the company shall be brought in their names. Such a stipulation will confer upon the parties nominated the right of suing as nominal plaintiffs, but a subsequent alteration in the original stipulation, made without the consent of all the members of the company, will not enable any one member alone to bring actions on the behalf of the company. (d) And where the formation of the company is authorised by an act of

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*specially* to a firm, the same rule applies, in the event of the death of a partner, which governs cases of express contract. See *Attwood v. Rattenbury*, 6 B. Moore, 579. *Ord v. Portal*, 3 Campb. 239. *Rordasnz v. Leach*, 1 Stark. N.P.C. 446.

(a) 3 T.R. 443. 5 T.R. 493. 6 T.R. 532. (b) *Smith v. Barrow*, 2 T.R. 476.

(c) See *Cousins v. Smith*, 13 Ves. 542.

(d) *Davies v. Hawkins*, 3 Mau. & Selw. 433. In the case of *Radenhurst v. Bates*, 3 Bingh. 463., it was said that the members of a firm cannot, by agreement, give an authority to any one of them to bring an action in his name against persons not members of the firm.

parliament, the legislature, in giving its sanction, invariably remedies the inconvenience that may arise in recovering debts due to the company, by enabling them to sue in the name of their secretary for the time being, and in such a case it will of course suffice if the course prescribed be adopted. But as such acts of parliament are in effect private acts, and as they give to individuals certain powers over others, they must be construed strictly; and therefore if it be intended to extend the remedy beyond suits, the parties who bring in the act should be careful to use such language as plainly includes all the cases to which they mean it to apply, for a court of law will not go beyond the words of an act unless the meaning of the legislature very clearly justifies it in doing so. Therefore, where a private act of parliament, entitled "An act to enable a certain Insurance Society to *sue* and be sued in the name of their secretary," enacted that they might commence all *actions and suits* in his name as nominal plaintiff; it was held, that this did not enable the secretary to petition, on the behalf of the society, for a commission of bankruptcy against their debtor. (a)

Actions *ex delicto*, or actions arising out of some wrongful injury committed by a stranger affecting partnership property, are of less frequent occurrence than those which result from a breach of contract. The rule, however, which in actions on contracts requires the joinder of all the parties, appears to be equally applicable to actions founded upon a tort; although, as will be seen hereafter, it is less rigidly enforced. It is laid down, as clearly established law, that for an injury to the joint property all the partners ought to join (b); but, if too many persons be made co-plaintiffs, the objection, if it appear on the record, may be taken advantage of either by demurrer, in arrest of judgment, or by writ of error (c); and, if the objection do not appear on the face of the pleadings, it will be a ground of nonsuit at the trial. If one or more of the partners die after the injury is committed, the action must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately; and therefore, to

(a) *Guthrie v. Fisk*, 3 B. & C. 178. And see *Ex parte Guthrie*, 1 Glyn & James, 245.

(b) Bac. Abr. Tit. Joint Tenant, (K.) *Sedgworth v. Overend*, 7 T.R. 279. Co. Litt. 198. a. *Bloxam v. Hubbard*, 5 East, 407.

(c) *Cook v. Batchellor*, 3 Bos. & Pul. 150. *Coryton v. Lithebye*, 2 Wms. Saund. 116. a. Cro. Eliz. 473.

an action of trover brought by the survivor of three partners in trade, it cannot be objected that the two deceased partners and the plaintiff were joint merchants, and consequently that, in respect of the *lex mercatoria*, the right of survivorship did not exist; for the legal right of action survives, though the beneficial interest does not. (a)

It remains now to be inquired, what are the consequences of a nonjoinder of the parties, in relation either to an action *ex contractu*, or an action *ex delicto*, and in what manner, in each case, advantage is to be taken of it by a defendant. Where the right of action is joint, as founded on a joint contract, the objection that the action is brought by one of several parties, who ought to have sued jointly, may be made available, either by demurrer, or on motion in arrest of judgment, or by writ of error, if it appear on the record; and, though the objection do not appear on the pleadings, yet, if the contract is alleged as several, the defendant may plead in abatement, or may avail himself of the nonjoinder at the trial, as a ground of nonsuit upon the plea of the general issue. (b) In the event of a death, the declaration by one partner must show the death of the other, which cannot be presumed. (c) And if an action is brought by the executors of the survivor, it is necessary to aver that their testator survived the others; it not being requisite, as it is in the case of persons jointly liable, that the exception should be taken by plea in abatement. In this, however, there seems some incongruity; and Mr. Serjeant *Williams*, in a note (d) to his very valuable edition of *Saunders's Reports*, at the same time that he has admitted the rule to prevail, has observed, that "as to assumpsit by one only, at the time when most of the cases upon this subject were decided, the same rule extended as well to defendants as to plaintiffs. The rule in both cases was founded upon the same reason, that the contract proved was not the same with that in the declaration. (e) But as soon as it was decided, in the case of *Rice v. Shute* (g), and the other cases which followed it, that leaving out one of the joint con-

(a) *Kemp v. Andrews*, Carth. 170. S. C. 3 Lev. 290. 1 Show. 188.

(b) 1 Chitt. on Plead. 7.

(c) *Scott v. Godwin*, 1 Bos. & Pul. 67. *Jell v. Douglas*, 4 B. & A. 374. *Eccleston v. Clipsham*, 1 Wms. Saund. 154. n. 1.

(d) *Cabell v. Vaughan*, 1 Wms. Saund. 291. (g)

(e) *Skin*, 640. 2 Stra. 820. (g) 5 Burr. 2611. S. C. 2 Blacks. Rep. 695.



tractors did not vary the contract, one would have thought that the same principle would be applied to the case of persons with whom the contract was made. If the contract be still the same, notwithstanding one of the persons, who *ought to be joined*, is omitted, upon what principle is it that the contract is *not* the same, if one of the persons who *ought to join* be omitted? Perhaps it may be objected, that, by this means, the plaintiff and the defendant are not upon equal terms; that in an action *against* one only, he necessarily knows all the persons liable; but in actions *by* one only, the defendant may often not know, nor be able to know, what persons ought to join. But, in answer to this, it should always be remembered that the rule is founded upon the *supposed variance* between the contract proved and the contract laid, and not upon any convenience or inconvenience to the parties. As to the *knowing* of the persons, the cases respecting defendants have decided that this circumstance is immaterial; and as to the *convenience* or *inconvenience* of the thing, it should seem more convenient that the parties should, after issue joined, proceed upon the merits, than that the defendant should be allowed to nonsuit the plaintiff upon a mere matter of form." However, the rule is general, not applicable solely to actions of assumpsit on parol contracts, but affecting alike every species of action bottomed on contract, such as debt or covenant. In an action of debt upon a bond or a covenant for payment of money, or in an action of covenant brought to recover damages for the non-performance of a covenant, if it appear, for the first time, at the trial, that in the former instance, the bond or covenant, or, in the latter, that the covenant only were delivered and entered into in favour of the plaintiff, jointly with another person, and the nonjoinder of that person is not excused by the plaintiff by an averment of his death, the defendant may, under a plea of *non est factum*, avail himself of the objection, and the plaintiff will be nonsuited; but, if the objection is apparent, otherwise than at the trial, as if the pleadings themselves disclose it, the defendant, as in actions of assumpsit, may take advantage of it, either by demurrer, in arrest of judgment, or by writ of error. (a) A defendant may, likewise, avail himself of the objection, by pleading in abatement. (b)

(a) Cabell v. Vaughan, 1 Wms. Saund. 291. f.

(b) Com. Dig. Tit. Abatement, E. 12.

With respect to actions *ex delicto*, or actions of trespass, or of tort, brought by partners, the rule is different from that which prevails in actions founded upon contract. Notwithstanding all the several parties who are jointly concerned in interest ought, when a joint injury is sustained, regularly to join in an action for its redress, still, if all of them have not joined, the defendant must plead the omission in abatement (*a*), and cannot otherwise take advantage of the objection. (*b*) This rule has been long established; for so far back as the time of Lord *Hale* we find this doctrine laid down by him: "If a tenant in common bring a personal action without his fellow joining in the suit, the defendant ought to take advantage of it in abatement; but if he plead not guilty, it shall be good; but then he shall recover damages only for a moiety." (*c*) The opinion of Lord Ch. J. *King* is in perfect concordance with Lord *Hale's*: "If one tenant in common of a personal indivisible chattel bring trover against a stranger, if the stranger doth not plead the tenancy in common in abatement, he can have no benefit of it in evidence under the general issue." (*d*) Neither can it, according to modern decisions, avail a defendant who neglects to plead the non-joinder in abatement, that the defect appears on the face of the declaration, although consistently with the older authorities (*e*), if the defective title were disclosed by the record, it was a ground to arrest the judgment. (*g*) The law upon this subject was very

(*a*) A plea in abatement is that which, without denying that the plaintiff has such a cause of action as is alleged, asserts, that in some incidental respect the action is improperly brought: and the object of it is not to defeat the claim, but to delay the prosecution of it. The character generally ascribed to it is, that it must give the plaintiff a better writ; but this, although generally, is not universally true: for sometimes the right of delaying the claim by a plea in abatement is founded on a temporary disability of the plaintiff to sue, as, that he is an outlaw or an alien enemy. There are several rules by which these pleas are held to much greater strictness than those which go to the merits of the action; but a more particular exposition of their nature and effects would be foreign to the present purpose.

(*b*) *Bloxam v. Hubbard*, 5 East, 420. *Cabell v. Vaughan*, 1 Wms. Saund. 291. h.

(*c*) 1 Mod. 102. See also *Skin*. 640.

(*d*) *Barnardiston v. Chapman*, cited 4 East, 121. See also *Brown v. Hedges*, Salk. 290. Cro. Eliz. 554. Evidence of a joint tenancy, or tenancy in common, between the plaintiff and a third person, cannot be received under the general issue in bar of the action; but as the plaintiff can only recover damages for the value of his share of the property, such evidence is admissible for the purpose of ascertaining the amount of damages. *Nelthorpe v. Dorrington*, 2 Lev. 113. Bull. N. P. 35.

(*e*) See *Hamon v. White*, Sir W. Jones, 142. S. C. *Latch*, 152.

(*g*) *Cabell v. Vaughan*, 1 Wms. Saund. 291. h.

fully and ably considered in the case of *Addison v. Overend* (a), in which the Court of King's Bench determined, that if one of several part-owners of a chattel sue alone for an injury done to it, the defendant can only take advantage of the objection arising from the nonjoinder of the other by a plea in abatement, and that the circumstance of the defect in parties appearing on the face of the declaration does not form a ground for arresting the judgment. And if a defendant does not avail himself of the opportunity afforded to him of pleading in abatement of the action first brought by a single partner, or part-owner of a chattel, he is precluded from taking the same objection to an action brought by the other partner or another part-owner of the same chattel; because, by omitting to plead in abatement in the first instance, he must be taken to have assented to the severance of the actions. Therefore, it has been decided (b), that if one part-owner has sued alone and recovered, the defendant, not having availed himself of his plea in abatement, cannot plead to the action of a second part-owner, that the first, who has already recovered a satisfaction, ought to have joined; and Mr. Justice *Lawrence* has expressed his opinion, that if there had been several remaining tenants in common, the defendant could never have objected to the severance of the actions after omitting to plead in abatement in the first action.

As in actions brought by individuals, the defendant is allowed to set off what is due to him from the plaintiff in reduction or extinguishment of the demand made against him, so in those which are instituted by partners the defendant has the same right of set off. This is allowed to prevent a circuitry of actions, by an investigation of the counter-claims to settle and adjudicate the rights of the different parties in one and the same suit. The right of set-off we will consider, first, as it respects actions brought by all the partners, and secondly, as it regards those actions in which the survivor of the partners alone appears as a plaintiff. Where the action is brought by all the partners, nothing is capable of being set against their demand, except a

(a) 6 T. R. 766. In the case of *Snellgrove v. Hunt*, 1 Chitt. Rep. 71. S. C. 2 Stark. N. P. C. 424., where one of two assignees of a bankrupt sued in trover, the nonjoinder was held to be a ground of nonsuit under a plea of the general issue; and Lord *Tenterden* observed, that he did not recollect any case where such a nonjoinder had been pleaded in abatement.

(b) *Sedgworth v. Overend*, 7 T. R. 279.



debt jointly due from them to the defendant; for, to admit of a set-off, there must not only be a mutuality of debt, but whatever is due must be a debt due in the same right. (a) Therefore, a separate debt due from an individual partner is not the subject of set-off against the joint demand of a firm; unless, indeed, the parties renounce this right and deal under an agreement expressly admitting of such a set-off. (b) But money due for advances made by bankers to their customer upon a bond given by the customer to one of the partners, in trust for the rest, may be set off against a debt from the firm. (c) And any *bonâ fide* demand contracted by one partner in the name of the partnership may be set against a debt incurred to the firm. (d) And it will not, in such a case, affect the debt proposed to be set off, that it was incurred by a mere nominal partner, who was uninterested in the profits; because although, as between themselves, they may not be partners, yet strangers who are not cognizant of their private arrangements must be guided by external indications. (e) So a debt on a bond purporting to be a joint and several bond, but executed only by one of the obligors, may be set against a demand made by the obligor who has executed it. (g) And if a person make and remit a promissory note to his bankers, who indorse it to an individual partner in respect of a debt due to him from the firm, in an action by such indorsee against the maker of the note, the latter may set any debt due to him from his bankers against the demand on the note; because the holder being a partner in the banking-house, the members of that firm could not, as between themselves, divert the note to another purpose, and leave the whole of the defendant's debt outstanding. (h) In like manner, if an action be brought by an ostensible and a dormant partner, the defendant, it has been said, may set off a debt due to him from the ostensible partner. Thus, where a single partner was permitted by his copartners to appear as solely interested in a business, in an action by all the partners to recover a joint debt, it was held

(a) See 2 Geo. 2. c. 22. s. 13., made perpetual by 8 Geo. 2. c. 24. s. 4. At Common Law, a set-off is not allowable at all. *May v. Brown*, 3 B. & C. 134.

(b) *Kinnerly v. Hossack*, 2 Taunt. 170.

(c) *Crosse v. Smith*, 1 Maule & Selw. 545.

(d) *Teed v. Elworthy*, 14 East, 210.

(e) *Id. ibid.*

(g) *Fletcher v. Dyche*, 2 T. R. 32. *Elliot v. Davis*, 2 Bos. & Pul. 338.

(h) *Puller v. Roe*, Peake's N. P. C. 197.

that the defendant might set against it a debt due to him from the single partner. (a) So, if a factor, who sells goods for a firm under a *del credere* commission, sells them as his own, and the buyer knows nothing of the owners, he may set off a debt due to him from the factor against the demand of the owners of the goods. (b) But in an action by a solvent member of a firm and the assignees of his partner, against whom a commission of bankruptcy had issued, to recover payment of a sum transferred by the bankrupt after he had committed an act of bankruptcy, the defendant, it was held, could not set off a debt due to him from the firm. (c) Where the action is brought by a surviving partner, the defendant may set a debt due from him as surviving partner, against a debt due from himself to the plaintiff in his own right. (d) And, *e converso*, a debt due to the defendant, as surviving partner, may be set against a demand on the defendant in his own right. (e)

Having considered the various remedies which the law has furnished to partners for the infraction of their rights by strangers, it now remains to enquire into the requisite *evidence* in actions brought by partners. Where the contract, which is the foundation of their action, has been expressly made with all the members of the firm, it will be sufficient for them to prove it, and the breach of it, without entering into evidence to show that they are partners, or have a joint interest in the subject-matter. (g) But if the action is brought upon a contract, which was made by the joint agent of all, or by one partner in behalf of all, and their names have not been expressly mentioned, it will be incumbent on them to prove a joint interest, arising by implication, as by evidence that they are partners, and jointly interested in the particular subject. It must be proved that all the persons who sue were partners at the time of the contract; one, who has been subsequently admitted into the firm, though under an agreement to share in profit and loss, from a time an-

(a) *Stacy v. Decy*, 1 Esp. N. P. C. 469. S. C. 7 T. R. 361. n. But see *Lloyd v. Archbowl*, 2 Taunt. 234. *Skinner v. Stocks*, 4 B. & A. 437. *Grant v. The Royal Exch. Ass. Comp.* 5 Maule & Selw. 459.

(b) *George v. Claggett*, 7 T. R. 359.

(c) *Thomason v. Frere*, 10 East, 427. See *Smith v. Goddard*, 3 Bos. & Pul. 469. *Staniforth v. Fellowes*, 1 Marsh. 184.

(d) *French v. Andrade*, 6 T. R. 582.

(e) *Slipper v. Stidstone*, 5 T. R. 493.

(g) See *Evans v. Mann*, Cowp. 569.

tedent to the contract, ought not to be joined (*a*); neither ought any one of those, who were partners when the contract was made, to be omitted. (*b*) The evidence of partnership usually consists in the oral testimony of clerks, or other agents or persons, who know that the alleged partners have actually carried on business in partnership; it is unnecessary, even in criminal cases, to produce any deed or other agreement by which the copartnership has been constituted. (*c*) And where a witness, called by the partners to prove the fact of partnership, is unable, at the moment, to specify the several names of the partners, a number of names, containing those of the partners amongst others, may be suggested to him, for the assistance of his memory. (*d*) When partners sue as indorsees of a bill of exchange, and the bill has been indorsed to them in blank, it will not be necessary for them to prove that they are in partnership, or that the bill was delivered to them jointly (*e*); but if the bill is made payable or indorsed specially to them, strict evidence must be given that the partnership consists of the parties named on the record. (*g*) And it is stated to have been held, that if a bill, indorsed in blank, is sent to a particular house, and an action is afterwards brought thereon by some of the members of that house, and additional parties, there must be some evidence that that house transferred the bill to the plaintiffs, or consented to their suing upon it; and that this evidence must be given, though the bill was sent to the house for the benefit of the persons who sue. (*h*) Persons, who sustain the characters of partners, may, in some instances, be admitted as witnesses in actions instituted on behalf of the firm, to which they are not made parties, and the interest they may possess in

(*a*) *Wilsford v. Wood*, 1 Esp. N.P.C. 128.

(*b*) *Leglise v. Champante*, 2 Stra. 820. In one case, where an action was brought in the names of two persons, with whom the defendant had dealt as partners, and it appeared that, at the time of the contract, there was in fact another partner, who had, however, withdrawn his name from the firm, but still continued to receive part of the profits; although it was objected that the dormant partner ought to have been joined, Lord *Kenyon* is reported to have refused to nonsuit the plaintiffs. *Leveck v. Shaftoe*, 2 Esp. N. P. C. 468. See *ante*, p. 128.

(*c*) 3 Stark. on Evid. 1067. *Alderson v. Clay*, 1 Stark. N. P. C. 406.

(*d*) *Acerro v. Petroni*, 1 Stark. N.P.C. 100.

(*e*) *Ord v. Portal*, 3 Campb. 239. *Rordasz v. Leach*, 1 Stark. N. P. C. 446. *Attwood v. Rattenbury*, 6 B. Moore, 584.

(*g*) *Ord v. Portal*, *supra*.

(*h*) *Machell v. Kinnear*, 1 Stark. N. P. C. 499.



the event will not disqualify them from giving their testimony. Thus, a man who, without having an interest in the capital of a partnership or its profits, suffers his name to be used as a partner, is a competent witness in an action commenced by the actual proprietor of the concern, to prove a contract made with such proprietor in the joint name. (a) And, in an action on a contract, a dormant partner not being one of the contracting parties, and who has had no privity of communication with them on the subject of the contract, is competent to prove the contract. (b) So a party is competent, although he has purchased from the plaintiff an interest in the contract on which the action is brought. (c) And, on the ground that agents are from necessity competent witnesses for their principals, it has been held that a person who was employed to sell goods, and was to receive for his trouble whatever money he could procure for them beyond a stated sum, was a competent witness to prove the contract between the seller and buyer; and that there was not any difference, in point of interest, between a person who sold upon commission and one who was to have a share of the profit. (d) So, if upon the dissolution of a partnership there be an agreement that each of the partners shall receive certain debts, either partner is competent in an action by the other partner against a debtor to the firm, to prove payment to him according to the agreement. (e) And, as we have before seen, in an action by several partners against the defendant for the non-performance of an agreement, a declaration by one of the partners, that the goods to which the agreement related were his separate property, and had been allotted to him out of the partnership stock, is evidence against the plaintiffs suing as upon a joint contract. (g) Upon the same principle, one of the partners, although party to the suit, may, if the defendant waives all objection to his testimony, and with his consent, be admitted as a witness, to disprove the defendant's liability to the demand made upon him, notwithstanding he at the same time

(a) *Parsons v. Crosby*, 5 Esp. N. P. C. 199. *Glossop v. Colman*, 1 Stark. N. P. C. 25.

(b) *Mawman v. Gillett*, 2 Taunt. 325. n. (c) 3 Stark on Evid. 1084.

(d) *Benjamin v. Porteus*, 2 H. Bl. 590. per *Heath* and *Rooke Js.*

(e) *Evans v. Silverlock*, Peake's N. P. C. 21.

(g) *Lucas v. Delacour*, 1 Mau. & Selw. 249.

defeats the claim of those who jointly sue with him ; for, as evidence of a declaration against his interest out of court would be admissible, the proof cannot be less credible, if he declares the same thing upon oath at the time of the trial. (a) Where it appeared on the record that the agreement, out of which the cause of action arose, was made by the plaintiff on behalf of himself and other proprietors, it was held that declarations made by one of such proprietors were admissible evidence on the part of the defendants. (b)

A defendant may be held to bail upon an affidavit made by one partner without the consent of the others, if the deponent swear positively to the debt, and expressly negative any tender of bank-notes having been made to himself, or to either of his partners, to the best of his knowledge and belief. (c) It remains to be observed, that where one partner resides abroad, and the others in *England*, an action upon a contract made with the firm must, to avoid a plea of the statute of limitations, be brought within six years after the cause of action arises. (d)

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## SECTION II.

### *Equitable Remedies for Partners against Strangers.*

THE *equitable* remedies possessed by partners for the vindication of their rights against strangers, are analogous to those which may be resorted to as between individuals ; nor are there any striking peculiarities to be remarked in the prosecution of a suit in equity by them. In such cases, the pleadings are much the same as when there is only one individual on each side. All the partners ought to join in the suit, and a plea of want of parties goes both to discovery and relief, where relief is prayed ; though the want of parties is no objection to a bill for a discovery merely. (e) But an objection for want of parties will not

(a) *Norden v. Williamson*, 1 Taunt. 378.

(b) *Kemble v. Farren*, 3 C. & P. N.P.C. 523.

(c) *Stacey v. Frederici*, 2 Bos. & Pul. 390. See also *Saville v. Roberts*, 1 Ld. Raym. 374.

(d) *Perry v. Jackson*, 6 T.R. 516.

(e) *Lord Redesdale's Tr. on Plead.* 226.

be allowed, where a sufficient reason to excuse the defect is suggested by the bill ; as where the party omitted is resident out of the jurisdiction of the court, and the bill charges that fact ; unless the defendant should controvert the excuse made by the bill, by pleading matter to show it false. (a) And the rule that all persons interested in the suit must be parties admits of exception, and yields when justice requires it, in the instance either of plaintiffs or defendants. Where a bill is filed by the partners or proprietors of any great adventure, the rigid enforcement of the rule would lead to perpetual abatements, and therefore a court of equity has long held, that there is, of necessity, an exception to the general rule when a failure of justice would ensue from its too strict application. Thus, where it is impracticable, from their number, to make all the proprietors of a joint undertaking parties by name, and a sufficient number are brought before the court to represent the absentees, an objection for want of parties will not be suffered to prevail. (b) But the members who sue cannot do so in their individual capacities ; their right of suing is only *quá* members, and they must ask for relief not for themselves only but for all the other members of the society. Therefore, where to a bill for the specific performance of an agreement, for a lease entered into by the trustees of a numerous company, for the use of the company, the defendant demurred, on the ground that it did not appear by the bill that the plaintiffs were members of the company, and that none of the members were made parties, the demurrer was allowed. (c) And where the plaintiffs sued on behalf of themselves and others, being subscribers to a joint stock company, and who had assigned to them their interests in the concern, with powers to sue and otherwise act for them, but upon condition that after payment of all expenses the plaintiffs should hold any thing recovered in trust for the said others ; a demurrer, *ore tenus*, that such other persons were not parties to the suit, prevailed. (d)

(a) Lord Redesdale's Tr. on Plead. 226. and p. 134. Beames on Pl. in Eq. 151.

(b) *Chancey v. May*, Prec. in Cha. (ed. Finch) 592. *Meux v. Maltby*, 2 Swanst. 277. *Cousins v. Smith*, 13 Ves. 542. Where a private act of parliament enables a company to commence all actions and suits in the name of their secretary, as nominal plaintiff, it seems that they are at liberty to file a bill in equity in his name. *Per Holroyd J. Guthrie v. Fisk*, 3 B. & C. 185. See *ante*, p. 95.

(c) *Douglas v. Horsfall*, 2 Sim. & Stu. 184.

(d) *Blair v. Agar*, 1 Sim. 37.



There is one species of suit in equity peculiar to partners, namely, a bill to be quieted in the possession of the partnership property, where the separate creditor of an individual partner has taken the joint effects in execution. The person claiming under an execution, founded on a judgment for such a debt, is only entitled to the undivided share of the indebted partner, and that subject to an account between him and the partnership. The solvent partners may, therefore, on a bill filed for the purpose, obtain an injunction to stay proceedings under the execution, until the proper accounts are taken, and it is ascertained what interest the debtor has in the partnership stock (*a*); and, if it appears that he has not any interest, the injunction will be made perpetual. (*b*) After judgment obtained at law against a partnership firm for a debt, a court of equity will not, it seems, at the instance of one partner, grant an injunction to stay execution on the ground that he had retired from the partnership long before the debt was incurred, and that the plaintiff at law was apprized of it, because such circumstances would constitute a good legal defence. (*c*)

(*a*) *Taylor v. Fields*, 4 Ves. 396. S. C. 15 Ves. 559. n. *Barker v. Goodair*, 11 Ves. 85.

(*b*) *Taylor v. Fields*, *supra*.

(*c*) *Protheroe v. Forman*, 2 Swanst. 227.

## CHAPTER IV.

## SECTION I.

*Legal Remedies against Partners.*

OUR inquiries have, hitherto, been engaged in ascertaining what are the remedies possessed by partners for the adjustment of differences existing between themselves, and likewise those which are furnished to them for the vindication of their rights when violated by strangers; we will now endeavour to explain what are the legal liabilities they incur to third persons, which, both as they regard the partners themselves, and those who have dealings with them, are of the utmost importance. In this investigation, and under this head, we must, to avoid repetition and unnecessary prolixity, incorporate, in a great measure, the power impliedly granted by law to one partner, of binding his copartners, which we have before at length explained. It scarcely need be observed, that, in the exercise of that power, any partner will render the firm responsible, so long as the person, with whom he contracts, deals with him on the footing of his being one of its constituent members, without being, either directly or indirectly, apprised of a revocation of the authority presumptively arising from his relative situation. The very constitution of the relationship of copartners furnishes a presumption, that each individual is an authorised agent for the rest, but this presumption has no operation, where a party who would rely upon it, has received express notice to the contrary, or where the transaction between himself and the individual partner is a fraud upon the rest. With the exception of the power so possessed by each of binding the others, the responsibilities which, as a body, partners incur, differ not essentially, with regard to contracts, from those that may be created between individuals. Of torts, they can seldom, perhaps in no instance, be actually guilty in their joint capacity; but, where an injury has been inflicted through the negligent management of a carriage or vessel belonging to per-

sons jointly, although the law does not, as a consequence of that act, ascribe to each proprietor the character of trespasser (*a*), yet, on the ground of the joint ownership, it holds all liable to repair the injury sustained, whether the person appointed to drive the carriage, or to steer the vessel was or was not one of themselves. The task of deciding in what instances partners are responsible is easy, when the question of liability arises in a case in which they have all concurred; but it becomes comparatively difficult, if the subject of dispute originated not in the act of all, but of a single partner. Perplexity has, likewise, arisen where judgment has been obtained against an individual partner for his separate debt, and the writ of execution, consequent upon the judgment, has been executed against the separate interest of that partner in the joint effects. The right with which, in such a case, the law invests the judgment creditor, we will, in its proper place, consider. The subject of inquiry which now presents itself is, in what instances a joint responsibility to third persons is brought upon partners, either by the concurrent act of the firm, or the separate act of a single partner.

When the contract attempted to be enforced against a firm is one which, in its inception, received the sanction and countenance of each partner, the joint obligation, attaching upon them to perform it, is plain and manifest. Each individual member of the firm is necessarily presumed to participate in the benefit resulting from such a contract; and to countervail that advantage, the joint duty, obliging them to fulfil it, is imposed. In substance and effect, an engagement so made by a firm is in no respect dissimilar from the single engagement of an individual. The difference is only in the number of the parties to it; but the consequences and responsibilities which ensue a breach of it are precisely the same. Similar, in every respect, are contracts entered into by one partner on the behalf of the firm, in a transaction connected with the partnership. For such a purpose each partner separately is, to all intents, the authorised and legally recognised agent and representative of the whole firm; and his acts, therefore, referable as they likewise are to the character of principal, which to a certain extent he sustains, are as binding upon the firm, as if they obtained, at the time, their express and unequivocal ratification. In simple contracts, therefore, of every

(*a*) *Moreton v. Hardern*, 4 B. & C. 223.



description, in the purchase of stock on the joint account, in the making, drawing, accepting, or indorsing of promissory notes or bills of exchange, one partner can, by his own act, in a transaction in its nature joint, pledge the credit of the firm in as effectual a manner as the partners themselves, when acting in concurrence, can do : and it is no answer to a claimant upon the firm that the debt which he seeks to recover was fraudulently contracted by the partner, or that it arose from a dishonest and criminal misapplication of money received by him, if the debt were incurred, and the money received in the course of business, notwithstanding that, in the latter case, the single partner gives his separate receipt for the money. (a) That the fraudulent conduct of one partner does not afford to his copartner a legitimate excuse for the non-fulfilment of a joint contract entered into by the former, is strongly exemplified by a recent decision. In that case (b), A having employed B and C, who were partners as wine and spirit merchants, to purchase wines, and sell the same upon commission, C, the managing partner, represented that he had made the purchases, and that he had sold a part of the wines at a profit, the proceeds of which supposed sales he paid to A, and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, however, C had neither bought nor sold any wine: the transactions were wholly fictitious, of which B was utterly ignorant. Upon the whole account a larger sum had been repaid to A, as the proceeds of that part of the wine alleged to be resold, than he had advanced ; but the other part of the wine, which C represented as having been purchased, remained unaccounted for. It was determined by the Court of King's Bench, that B was responsible for the false representations of his partner, and that A was not only entitled to retain the money which had been paid to him upon these fictitious sales, but that he might maintain an action for money had and received, to recover the specific sums advanced for the number of pipes of wine unaccounted for. So, where a firm of bankers, employed to receive dividends in the funds (of which one of the firm was a co-trustee) had in their own books credited their employers with the dividends as received, and had allowed them to draw without

(a) Willet v. Chambers, Cowp. 814.

(b) Rapp v. Latham, 2 B. & A. 795. A partnership cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy. Kilby v. Wilson, 1 Ryan & Mood. 178.

having any other funds in their hands, the bankers were held to be bound by the entries so acted on, although not communicated; and they could not set up as a defence, that the entries had been fraudulently made by one of the partners, the money never having been received by the house, but converted to that partner's own use. (a) And where one of three trustees of stock in the funds, being also a partner in a banking-house, under a forged power effected the sale of the stock, the produce of which was paid by their agent into the house generally, and was never appropriated to any particular account; it was held, that it being the duty of the house to have placed it to the credit of the trustees, and subject to their order, the latter were entitled to recover it; and that if the transfer had been made without authority, or by any wrong act, they might waive the wrong and demand the money; and it was also determined, that although a party cannot sustain an action against a felon, or sue with him when the claim is founded on the felony of one of the defendants, yet after the conviction of the felon, the parties who have received the money cannot protect themselves against the demand for it, by showing the felony on the part of one of their members. (b) Even by a guarantee, the power of signing which is not necessary or indispensable to the conduct of the trade, we have seen (c) that one partner may, in some instances, implicate the firm. Nor is it to transactions only, which strictly and actually partake of a joint character, that the power of a single partner to bind the firm extends. In matters not affecting the partnership, he may, in some cases, exercise this implied authority, and the contracts or engagements into which he may enter will be binding upon the firm, if the person with whom he contracts, be at the time ignorant of the fact of their disconnection with the partnership, and deal with the single partner in the full confidence and *bonâ fide* expectation, that what he does individually will receive the subsequent sanction and confirmation of the firm. Thus, as we have in a preceding chapter (d) stated, in the ordinary case of discount, one partner may pledge the name of the firm to a bill of exchange, and if there be no *mala fides* on the part of the discounter, the firm will be responsible, notwithstanding

(a) *Hume v. Bolland*, 1 Ryan & Mood. 371.

(b) *Stone v. Marsh*, 6 B. & C. 551. S. C. 1 Ryan & Mood. 364.

(c) See *ante*, p. 56.

(d) See *ante*, p. 46.

the discount of the bill was procured by the single partner with the fraudulent and dishonest view of appropriating the produce to his own private purposes; and the produce was afterwards so applied. So an application by a single partner of a joint security in discharge of his individual debt will, in some instances, be operative against the firm, if there be no collusion, and the transaction on the part of the creditor be fair and open; because it is not necessarily to be inferred, in such a case, that the application is fraudulent as it respects the copartnership. The individual partner may, for a valuable consideration, or in virtue of some arrangement with his copartners, have become the sole proprietor of the security, so as to be authorised to deal with it as his own. (a) But a disclaimer of the partnership, by one of several partners made to any given individual, will have the effect of saving that partner from being bound by any contract to be afterwards made by the other partners with the same individual, even though made conformably to the express terms of partnership agreed upon. Thus, three persons entered into partnership in the trade of sugar-boiling, and agreed that no sugar should be bought without the consent of the majority. One of them afterwards made a protest that he would no longer be concerned in the partnership with them: the two other persons subsequently contracted for sugars, the seller having notice that the third had disclaimed the partnership; and it was held that he should not be charged. (b) And where, previously to the dissolution of a partnership, an order for goods was given by two partners, and a bill for the amount was drawn on them, but was accepted only by one, who carried on a separate trade, and the goods were delivered to him, it was held that no claim could be made upon the other partner. (c) So, if the person with whom the single partner deals is, at the time, conscious of the misconduct of that partner in pledging the joint name to a separate transaction, he cannot enforce against the firm any claim that may arise to him out of such dealings. Neither can he call upon the firm to fulfil a contract which has been made by one partner, if he be privy to a private agreement between the partners themselves, the effect of which is to throw the responsibility

(a) *Per Lord Ellenborough, Ridley v. Taylor*, 13 East, 175.

(b) *Vin. Abr. Tit. Partners*, A. 11. ; and see *Willis v. Dyson*, 1 Stark. N. P. C. 164.

(c) *Ex parte Harris*, 1 Madd. 583. ; and see *Pinder v. Wilks*. 1 Marsh. 248; *S. C.* 5 Taunt. 612.



upon the single partner alone. Therefore, where four persons are partners in a coach concern, but one by agreement provides the coaches at a certain rate per mile, he alone is responsible for repairs done to the coach, by a person cognisant of this arrangement, although the names of all four appear on the vehicle. (a) So, if it be notorious that the proprietors have separate departments and separate interests, they must be sued separately by the tradesmen who may supply each with goods. (b) But the body of proprietors are jointly liable to a passenger, or a person who sends goods by their conveyance; and they are equally responsible for any damage that may be sustained through the negligence of a servant engaged by any one of them, whilst he is in the prosecution of the joint business. (c) And where one of several defendants, partners as carriers, together with the coach-office keeper, had agreed with a party to carry at the ordinary rates, notwithstanding the notice, and there had been subsequent accounts settled upon the footing of such contract, it was held that the carriers were liable, and not only the partners at the time, but all who might afterwards become so, until special notice given of an intention to rescind the contract. (d) In cases that are destitute of any intrinsic circumstances operating the discharge of the innocent partners from responsibility under a contract fraudulently entered into by the single partner for his own benefit, it is incumbent upon the party with whom he deals to observe the most ingenuous conduct; for if he can be considered as apprised of the nature of the transaction, or, still more, if it be manifest that the transaction has only a separate relation to the individual partner, it will be unavailing in him to attempt to affect the firm, unless he can show that the single partner had the authority of his co-partners to pledge their credit. If, indeed, he has obtained from the individual partner a joint negotiable security, under a consciousness at the time of the misapplication, he may, by sending it into circulation, render it available against the firm. Because, although in his hands, were he to attempt to put it in suit, the

(a) *Hiard v. Bigg, cor. Holroyd J.*, Winchester Spring Ass. 1819. Man. N.P. Ind. 220.

(b) *Barton v. Hanson*, 2 Taunt. 49. S. C. 2 Campb. 97.

(c) *Id.* *Ibid.* And see *Wayland v. Elkins*, 1 Stark. N.P.C. 272. S. C. Holt, N.P.C. 227. *Fromont v. Coupland*, 2 Bingh. 170.

(d) *Helsby v. Mears*, 5 B. & C. 504. S. C. 8 D. & R. 289.

instrument would be void; yet if, by negotiation, it get into the hands of a *bonâ fide* holder for value, who was not privy to the fraud originally practised, it would be just as operative against the firm, as if it had been free from primary imperfection. The firm may likewise be rendered responsible for the act of a single partner, although unconnected with, and having no relation to, the business in which they have jointly adventured, if it be done with their joint authority, either express or implied. (a)

A joint contract, however, entered into by one or more individuals, is binding only upon those who have a joint interest in it at the time of its inception; for no subsequent act by any person, who may afterwards become a partner, not even an acknowledgment that he is liable, will entail upon that person the obligation of fulfilling such a contract, if it clearly appear that a partnership did not exist at the time the contract was made. The joint interest must be contemporaneous with the formation of the contract itself to superinduce the corresponding liability to perform it. If it were otherwise the law would, in fact, create a supposed contract, when the real contract, between the parties was consummated before the joint interest and consequent joint risk was in existence. Thus (b) where several persons agreed upon a maritime adventure, and to provide a cargo of goods, which should, in the judgment of the majority, be proper for the voyage; and permission was given to the supercargo (who was to have a proportionate profit and bear an equal loss with the respective adventurers) to ship, on the joint account, as many goods as he might think fit; such goods being first approved by a majority of the persons concerned in the adventure, as proper for the voyage; and it was afterwards agreed, that each party was to hold no other share or proportion in the adventure than the amount of what each separately ordered and shipped; and that the orders given for the cargo and outfit of the ship were to be separately paid, and that one was not to be bound for any goods or stores ordered or shipped by the other; and that the supercargo should have free liberty to ship what goods were suitable to the voyage, over and above the ship and outfit, leaving room for those ordered by the adventurers, and that the

(a) *Sandilands v. Marsh*, 2 B. & A. 673.

(b) *Saville v. Robertson*, 4 T. R. 720.

ship should be made over in trust for the general concern: it was held, that if the supercargo afterwards purchased goods, as part of the cargo, and the ship sailed with the goods so purchased, he alone was liable for them, and not his co-adventurers jointly with him. The reason on which this determination proceeded seems to have been, that after the purchase of the goods made by the several adventurers, there was still, before they became joint property, a further act to be done, which was the putting them on board the ship in which they had a common concern for the joint adventure, and, until that further act was done, the goods purchased by each remained the separate property of the purchaser. The partnership in the goods did not arise until their admixture in the common adventure. So where one person purchases goods, and another is afterwards permitted to share in the adventure, the vendor cannot maintain an action against the latter for the price of the goods. (*a*) But where two or more persons are to share in goods to be purchased, and, by virtue of a previous agreement, a joint interest in the goods attaches the instant they are purchased, there, although one of them make the purchase, concealing at the time the names of the others, or, in fact, without any express authority from them to purchase on the joint account, it is nevertheless the same as if all the names had been announced to the seller, and therefore all are liable for the value of them. This question arose in a late case (*b*), where it appeared that a creditor, having been jointly concerned with his debtor in a foreign adventure, in respect of the advances on which the latter became indebted to the former, the creditor, with a view to liquidate his demand, agreed with his debtor to join with him in a similar adventure, of which he was to have a moiety, and to bear his proportion of the loss; and it was likewise agreed that the debtor should purchase and pay for goods for the adventure, and the returns should be made to the creditor to go in liquidation of his debt: under, and in furtherance of this agreement, the debtor purchased

(*a*) *Young v. Hunter*, 4 Taunt. 582. In *Greenslade v. Dower*, 7 Barn. & Cres. 635., *Bayley J.* observed, that there was a great difference between a bill accepted by one partner in the name of the partnership in the course of their trading, and one drawn for the purpose of founding the partnership. "Originally, each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others; no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership debt."

(*b*) *Gouthwaite v. Duckworth*, 12 East, 424.



goods for the adventure on credit, and it was decided by the Court of King's Bench, in an action brought by the seller against both the creditor and debtor, that, inasmuch as the goods were purchased in pursuance of the agreement for the adventure, in which it was stipulated and arranged that the creditor was to have an interest, he was jointly answerable for their price. (a) It is not, however, sufficient to constitute a joint liability for the capital brought into the trade that there is to be a subsequent participation in the profit derived from it. In such a case the right to participation can only take its origin from the time of the introduction of the capital; and, although communion of profit is a strong circumstance to explain a contract in itself doubtful, and to show, as the legal presumption is, that a partnership existed at the time amongst the participants; yet, where the nature of the contract clearly appears, it cannot have such a retrospect as to alter it, and to substitute the responsibility of several for that of an individual contractor. Therefore, if several persons agree to form a partnership, and that each shall contribute a certain share of the capital, and any of the persons borrow or purchase the share, which is by him afterwards brought into the common stock, the liability for payment to the lender or vendor is not joint but personal. (b) Nor can a liability as partner attach where there is neither a communion of profit nor a joint interest in the article purchased, but the purchase is made by one person upon an agreement between him and other persons, that each shall have a distinct share of the whole. Thus, where several different persons separately employed a broker to make purchases of tea at the *India House*, and the broker, upon payment of the usual deposit, made the purchases and took joint warrants for the whole, which he pledged to a banker as a security for monies advanced; it was held, that such an employment did not constitute a part-

(a) In the case of *Young v. Hunter*, 4 Taunt. 583, *Gibbs J.* is reported to have said, "I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor: as if the parties agree amongst themselves that one house shall purchase the goods and let the other into an interest in them, that other being unknown to the vendor; in such a case, the vendor could not recover against him, although such other person would have the benefit of the goods."

(b) *Per Lord Kenyon and Grose J.*, in *Saville v. Robertson*, 4 T.R. 720. See also *Gouthwaite v. Duckworth*, 12 East, 421. *Greenslade v. Dower*, 7 Barn. & Cres. 635.

nership amongst the employers, so as to render them either jointly or separately liable for the loan. (a) The same rule applies to a contract made by one person for the purchase of goods, and a subcontract made by him with others for taking particular shares; this subdivision of his beneficial interest, under the original contract, does not render the persons claiming under him responsible jointly with himself for the performance of the contract. (b) For instance, where three persons entered into an agreement to purchase goods in the name of one only, and to take aliquot shares of the purchase, but it did not appear that they were jointly to resell the goods, the Court of Common Pleas held, that on the failure of the ostensible buyer, the others were not answerable as partners with him. (c) And, in addition to the possession of a joint interest, it is requisite, to render a firm responsible, that credit should be given to them collectively; for if the separate liability of a single partner is alone originally regarded, the joint responsibility cannot afterwards be substituted. Therefore, where one of two partners drew bills of exchange in his own name, which he procured to be discounted by the same banker who had discounted other bills drawn in the joint name, it was held that the banker had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills, the proceeds being carried to the partnership account; and that it made no difference, that the banker, at the time he discounted, conceived that all the bills were drawn on the partnership account, since the money was advanced, by way of discount, solely on the security of the parties whose names were on the bills, and not by way of loan to the partnership. (d) So where in an action for the supply of articles to be used in mines, whereof the defendant was a share-

(a) *Hoare v. Dawes*, 1 Dougl. 371.

(b) *Coope v. Eyre*, 1 H. Bl. 37.

(c) *Coope v. Eyre*, 1 H. Bl. 37.

(d) *Emly v. Lye*, 15 East, 7. See also *Siffkin v. Walker*, 2 Campb. 308. *Ex parte Bolitho*, Buck. 100. Where, with the privity of one partner, a bill is drawn by the other upon the firm, but it is not accepted, and the payee discounts it, and the proceeds are applied to partnership purposes, he may sue both partners for money lent, or money had and received, notwithstanding they are not jointly liable on the bill. *Denton v. Rodie*, 3 Campb. 493. But where a firm, consisting of several, carry on business in the name of an individual partner, the whole firm will be bound by his acceptance or indorsement in the way of the joint business. *South Carolina Bank v. Case*, 8 B. & C. 427. *S. C.* 2 Mann. & Ryl. 459.

holder, it appeared, that the defendant had only paid for the shares to a person calling himself treasurer, and received a certificate purporting to be executed "by order of the directors;" that she was a proprietor in certain shares, and her name duly registered, &c., and that she was entitled to the profits of such shares; and it also appeared that, at the time of the supply, the plaintiff had no knowledge or reason to suppose the defendant in any way interested in the mine, nor had he supplied the goods on her personal credit; it was determined that he could not maintain the action against her. (a) And where previous to the actual formation of a company, a prospectus signed by the defendant was issued, indicating that it was in contemplation to form the company; and it appeared the defendant solicited others to become shareholders, and was present at a meeting of subscribers when it was proposed to take certain premises for the purpose of carrying on the concern, which were afterwards taken, but he never paid his subscription; it was determined he was not chargeable as a partner for goods supplied to the company, the prospectus not importing that he had become a partner in a partnership then formed. (b) But Lord *Tenterden* has ruled, that where one member of a club ordered goods for the benefit of all, every member, who either concurred in the order, or subsequently assented to it, was liable, although the member who ordered the goods was made the debtor in the tradesman's books; unless it clearly appeared that the tradesman meant to give credit to that member only. (c) And in a late case, in which it was proved that A had contributed to the funds of a building society, and had been present at a meeting of the society, and party to a resolution that certain houses should be built; the Court of King's Bench held, that this made him liable for work done in building the houses, without proof that he had any actual interest in them, or in the land on which they were built. (d) So where in an action against two, for goods supplied to a mining company, originated in fraud, but of which the jury found the defendants to have been ignorant, it appeared, that they had never signed the partnership deed, and had trans-

(a) *Vice v. Viscountess Anson*, 7 B. & C. 409. S. C. 1 Mann. & Ryl. 113.

(b) *Bourne v. Freeth*, 9 B. & C. 632.

(c) *Delauney v. Strickland*, 2 Stark. N.P.C. 416.; and see *Williams v. Nunn*, 1 Taunt. 270.

(d) *Braithwaite v. Skofield*, 9 B. & C. 401.



ferred their scrip before the action brought; but both had attended a meeting of the company, and it was held that they were liable. (a) And where the two requisites of a joint interest and a joint credit concur, nothing but actual satisfaction, or the extinguishment of the original consideration, by the acceptance of a higher security from an individual partner, can invalidate the claim which the creditor possesses against the firm. The partners, by a private arrangement, as is most frequently done in cases of dissolution, may stipulate that one of them only shall discharge the joint demands; but such an arrangement is not binding upon the creditor, even although he assents to it, and, in confirmation of his assent, takes collateral securities from the individual partner for the joint debt. For the acceptance of a security, not under seal, from a debtor, on account of his debt, does not extinguish or affect the debt, but the creditor is still entitled to sue for it, provided he does not receive the money, for which the security is given, upon the security. Where indeed, after a joint security has been given, the creditor, without the knowledge of one partner, renews it, and consents to take the separate security of the other partner in discharge of the joint debt (b), or where the other members of the firm sustain a detriment by the creditor's dealing with a single partner, as if, on the faith of such dealing, they permit the single partner to receive monies which otherwise they would have withheld (c); in such cases, it seems, the joint liability would be extinguished. But except in those, and similar instances, nothing but payment can control the right of the creditor to enforce his demand against all the members of the firm. Thus, where one of two partners applied trust money in the trade, with the privity of the other partner, and having afterwards separated, the partnership effects were assigned to the former partner, who undertook to discharge the joint debts; it was held that this private arrangement did not operate to discharge the retiring partner, but that both were liable to reimburse the trust money. (d) So where, on the dissolution of a part-

(a) *Ellis v. Schmæck*, 5 Bingham 521.; and see *Perring v. Hone*, 4 Bingham 28.

(b) *Evans v. Drummond*, 4 Esp. N.P.C. 89. But see *Ex parte Hodgkinson*, 19 Ves. 295.

(c) *Reed v. White*, 5 Esp. N. P. C. 122.; and see *Wyatt v. The Marquis of Hertford*, 3 East, 147.

(d) *Smith v. Jameson*, 5 T. R. 601.

nership, it was agreed between two partners, that one should take upon himself to discharge a debt due to a creditor, who was informed of it, and expressly undertook to exonerate the other partner from all responsibility; it was, nevertheless, determined that, as there was no consideration for the promise of the creditor, this arrangement did not constitute any defence to an action brought by him against both partners, the debt not being satisfied by the one, nor any new security having been given. (a) And where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, which was communicated to the holder, who consented to take the separate notes of the one partner for the amount, but with a strict reservation of his right against all the three partners, and a retention of the original bills; the separate notes having proved unproductive, it was held that he might still resort to his remedy against the other partners, and that the taking under these circumstances the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. (b) In like manner, where one of three partners retired, and notice was given to a creditor of the firm that the remaining partners had assumed the funds, and would discharge the partnership debts, the creditor assented to this agreement, and transferred the debts due from the old firm to the credit of the new firm, and afterwards drew on the new firm for a part of his balance, which was paid; but the new firm subsequently becoming insolvent, he brought an action for the remainder against all the members of the old firm, and it was held that the retiring partner was liable for all debts incurred before the dissolution of the partnership. (c) On the same principle, where a firm of four partners were indebted on a dishonoured bill of exchange, and having afterwards dissolved the partnership, a new firm was formed of three of them, and the holder of the bill indorsed it over to the latter firm, in order, if possible, to obtain payment of it; and whilst the bill was in their possession, the three settled their accounts with the fourth partner, saying that the bill had been satisfied by them, but the bill itself was not produced to, or seen by, the fourth partner at the time of such settlement: it was held, that this

(a) *Lodge v. Dica*, 3 B. & A. 611.

(b) *Bedford v. Deakin*, 2 B. & A. 210. S. C. 2 Stark. N. P. C. 178.

(c) *David v. Ellice*, 5 B. & C. 196. S. C. 7 D. & R. 690.

was no defence to the fourth, in an action by the holder against all the partners, the bill not having been, in fact, satisfied by the persons to whom it had been indorsed and handed over. (a) Neither is the responsibility attaching upon partners, when once it is incurred, varied, or altered, by the secession of some of the old, and the admission of new members, although the creditor continue to deal with the newly constituted firm for a length of time without notice to the retiring partners that he holds them responsible. For instance, a person depositing money with bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank, after a dissolution of the original firm and the constitution of a new one, which consists of some of the members of the old bank, and other persons, discharge the partners who have seceded, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the usual and ordinary course, for a period of four years, until they become insolvent. (b) In the exposition of the statute 5 *Eliz.* c. 4, it has been determined, that, if a person qualified to trade, by having served as an apprentice, unite himself in partnership with an unqualified person, who never exercises the trade, but only shares the profits and the risks of the partnership; such unqualified person is not subject to the penalties imposed upon a party who carries on a trade without having served as an apprentice. (c) In a former part (d) of this work it has been observed, that where there are several partnerships consisting partly of the same members, carrying on business under the same name, and entering into negotiable securities under the same signature, the holder of one of such securities, without notice that it was issued by either of the partnerships in particular, has a right to elect against which firm he will enforce it. And it may here again be remarked, that a nominal partner who is excluded from a participation in profit, and stipulates for an indemnity against loss, will not be responsible, in his character of

(a) *Featherstone v. Hunt*, 1 B. & C. 113.

(b) *Gough v. Davies*, 4 Price, 200. And see *Sleech's case*, 1 Meriv. 563. It seems that the old firm would continue liable although the old debt was carried, with the privity of the customer, into the books of the new firm, and placed as an item in their account to the credit of the customer. *Gough v. Davis*, *supra*.

(c) *Raynard v. Chase*, 2 Wils. 40. S. C. 1 Burr. 2.

(d) See *ante*, p. 48.



partner, to such claimants upon the firm as are apprized of the stipulation. (a)

In an action against an individual, he cannot object that the contract, attempted to be enforced, is rendered illegal by reason of the existence of a secret partnership between himself and another person. For instance, if, before the late statute, the name of a single under-writer appeared upon a policy of insurance, the insurer would not have been allowed, if a loss happened, to defeat a *bonâ fide* insurance, by urging, in answer to an action brought by the assured upon the policy, that a secret partnership existed between himself and another at the time of its subscription, and consequently that it was void. (b) Where, indeed, a person professing to engage only his own individual capital, pledged himself as such to the assured, it would be unjust, if he had been permitted to set up a secret partnership in avoidance of the policy subscribed by himself singly. (c) Neither can a partner set up a known partnership in abatement of a demand made upon himself individually, in a case in which his conduct has been fraudulent, both as regards his copartners, and the person who endeavours to fix him singly. Therefore where, to an action against one of several partners for not delivering goods with a count for money had and received, the defendant pleaded the non-joinder of his copartners, and it appeared that the defendant, being in partnership, made the contract individually, but in the joint name, and for the sale of joint property, and that, in fraud of his partners, he received the money and applied it to his own use, it was held that though the bill drawn for the amount of the goods was in the joint name, yet the plaintiff might recover the money paid in discharge of the bill under the common count. (d)

The responsibility of partners to third persons is not alone confined to cases of contract. In actions *quasi ex contractu*, and in actions of *tort*, they are, in some instances, jointly answerable to the injured party in damages. In the former species of action,

(a) *Alderson v. Pope*, 1 Campb. 408.

(b) *Sullivan v. Greaves*, Park on Insur. 8.

(c) See dicta of Lord *Kenyon* and *Lawrence J.*, in *Booth v. Hodgson*, 6 T.R. 405. See also dictum of *Heath J.*, in *Mitchell v. Cockburn*, 2 H. Bl. 379. Partners can now jointly underwrite a policy of insurance. See 5 Geo. 4. c. 114., and *ante*, p. 29.

(d) *Hudson v. Robinson*, 4 Mau. & Selw. 475.

which is, in its form, an action of tort, although substantially an action founded upon a contract, partners are clearly responsible. Thus, in the common case of a copartnership amongst persons as carriers, if, in the course of their business, they receive a parcel to be carried by them for hire, and the parcel be lost, they are unquestionably liable in an action upon the implied contract, that they would safely and securely carry it. And it can make no difference, as it regards their liability, if the owner, instead of considering the loss as forming a breach of promise, implied from the consideration of hire, chooses to allege his *gravamen*, as consisting in a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence. (a) The principle in either case is the same; and, although the form of action which is adopted cannot vary or alter the liability of the partners, it has given rise to questions which we shall have occasion hereafter to discuss.

Actions of tort may likewise, in some cases, be effectually sustained against partners. Their responsibility in actions of this description may be exemplified by the familiar instances of actions brought against them for driving against carriages or running down ships. In those cases, if the carriage or ship, occasioning the injury be the joint property of partners, it is immaterial whether it be under the direction or guidance of one of the partners or of their servant, because the maxim of law is *qui facit per alium facit per se*; and partners, like individuals, are responsible for the negligence of their servants. (b) And where it appeared that A and B were partners in the business of public carriers, and that by agreement between them, A provided horses and drivers for certain stages, and B for the remainder;

(a) *Govett v. Radnidge*, 3 East, 62. *Powell v. Layton*, 2 New Rep. 372. *Boson v. Sandford*, Skin. 278. S. C. 3 Lev. 258. Carth. 58.; but more fully reported 2 Show. 478.

(b) *Mitchell v. Tarbutt*, 5 T. R. 649. Where damages are sought to be recovered against partners for an injury sustained through the negligent conduct of their servant, the proper remedy is an action on the case. *Morley v. Gaisford*, 2 H. Bl. 442. *Hugget v. Montgomery*, 2 N. R. 446.; and, if the cause of the mischief be negligence, such an action will lie against all the partners, although one of them be personally present and acting in that which occasions it. But where the injury is inflicted by the wilful act of one of the partners, trespass is the proper form of action against him; and if under the circumstances any action will be against the other partners, case only can be sustained. See *Leame v. Bray*, 3 East, 593. *Ogle v. Barnes*, 8 T. R. 188. *Rogers v. Imbleton*, 2 N. R. 17. *Moreton v. Hardern*, 4 B. & C. 223.

it was holden, that, notwithstanding this division of the concern between them, they were responsible for the misconduct and negligence of their drivers and servants throughout the whole distance; and that it was not any defence to B that the servant, through whose negligence an injury had been committed, had been hired and was paid by A alone. (a) So, in an action of trover, it is not necessary that there should be a joint conversion in fact, in order to implicate all the partners; for such a conversion may arise by construction of law. Thus, an assent by some of the partners to a conversion by the others will make them wrong-doers equally with the rest, provided the conversion was for their use and benefit, and that they were in a situation to have originally commanded the conversion; in such a case the rule of *omnis rati habitio retrotrahitur et mandato æquiparatur* applies. (b) And if copartners are engaged in smuggling, which is a species of tort, on an information filed for the penalty, they are jointly, as well as separately, liable. (c) Indeed, in the instance of libels, an anomalous case, a bookseller or the proprietor of a newspaper is answerable for the acts of his agent or copartner, not only civilly but criminally. (d) But, except in these cases, partners are not generally responsible for the wrongs of each other. If they all join in one trespass or tort, of course they may all be sued, and compelled to make compensation for the injury they have committed: but an action for such a misfeasance would arise from their personal misconduct, and not from the relation of partnership subsisting between them. With regard to matters quite unconnected with the partnership trade or business, there cannot be a doubt but that a joint responsibility would not be incurred for a tort committed by an individual partner. And, in general, acts done in the course of the partnership trade or business, in violation of the law, will only implicate those who are guilty of them. If one of two bankers in partnership should commit usury in discounting bills; or if one of two surgeons in partnership should wantonly ill-treat a patient, the innocent copartners would not be liable to an action for penalties or damages. But if

(a) *Weyland v. Elkins*, Holt's N.P.C. 227. S.C. 1 Stark. N.P.C. 272.

(b) 4 Instit. 317. Com. Dig. Tit. Trespass, C. 1. And see *Nicoll v. Glennie*, 1 Mau. & Selw. 588.

(c) *Attorney-General v. Burges*, Bunb. 223. See also *Rex v. Manning*, Com. Rep. 616.

(d) *Rex v. Almon*, 5 Burr. 2686. *Rex v. Pearce*, Peake's N.P.C. 75. *Rex v. Topham*, 4 T.R. 126. Per *Littledale J.*, *Rex v. Marsh*, 2 Barn. & Cres. 723.



an attorney be in partnership with another who has not taken out his certificate, and their joint names are put on their papers in causes in their office, it has been ruled, that either of them is liable to the penalties imposed (a) for practising as an attorney without obtaining a certificate: though it appear that, by a private arrangement, the party sued was to derive no benefit from the suit, in respect of prosecuting which the *qui tam* action for the penalty is brought. (b) The consequence is, and it has accordingly been determined, that two attorneys or proctors cannot be sued together, as for one offence, for practising without a certificate. (c)

We have hitherto considered the liabilities attaching upon partners, as affecting solely those partners who are ostensible. The same rule, however, applies to a dormant partner. When he is discovered, he is equally liable as if his name had appeared in the firm, although unknown to be a partner at the time of furnishing the subject matter of the debt (d); and an action may be maintained against him alone upon a joint contract, if he do not avail himself of the legal objection arising from the nonjoinder of the ostensible partner, by pleading in abatement. (e) The liability of the parties depends upon their being partners at the time the contract is made, and a dormant partner cannot set up the plaintiff's ignorance of his being a partner to obviate such liability. Neither is it any security to him, more than to an ostensible partner, that he stipulated that his copartner should carry on the trade at his own separate risk, and that he should not be answerable for any of the joint debts or engagements. (g) Even those acts done by a creditor, such as selecting one partner, accepting new bills, &c. which are usually held to operate the discharge of the other partners, will not liberate an unknown dormant partner, if they were done by the creditor during the time of his concealment. (h) But in transactions unconnected with the joint trade, no liability will be entailed on a dormant partner, where his responsibility was not originally regarded, and the fact of his being a partner was unknown at the time the

(a) See 37 Geo. 3. c. 90. s. 26.

(b) *Edmonson v. Davies*, 4 Esp. N.P.C. 14.

(c) *Barnard v. Gostling*, 1 New Rep. 245. S. C. 2 East, 569.

(d) *Robertson v. Wilkinson*, 3 Price, 538. *Saville v. Robertson*, 4 T.R. 725.

(e) *Per Lord Kenyon*, *Saville v. Robertson*, 4 T.R. 724.

(g) *Hubert v. Nelson*, *Davies' B.L.* 8.

(h) *Robertson v. Wilkinson*, 3 Price, 538.

claim arose. Therefore, where one partner accepted a bill in the name of his firm, but not in a partnership transaction, it was held that an indorsee could not maintain an action on such acceptance against a dormant partner, whose name did not appear, and who was not known to be a partner, nor the bill taken on his credit. (a)

An action being instituted against partners, if those who are sued neglect to appear, the object of the plaintiff must be, to compel their appearance, since, until all appear, or those who do not appear are outlawed, he cannot proceed in his action. Where the process is bailable, and all are arrested under it, if the defendants do not appear according to the exigency of the writ, after bail to the sheriff has been given, the plaintiff may either take an assignment of the bail-bond, and proceed thereon against the defendants and their bail, or he may rule the sheriff to return the writ and bring in the bodies of the defendants. Where, however, bail for their appearance is not given, but the defendants remain in the custody of the sheriff, they may, notwithstanding their neglect to appear, be proceeded against as prisoners. (b) And if the process, instead of being bailable, be serviceable only, the plaintiff may, under the statute (c), proceed to judgment against them all, provided it be duly served upon each individual defendant (d), and they do not appear in pursuance of its mandate. But, where some of the defendants are resident abroad, and therefore, being without the jurisdiction of the court, are not capable of the effectual service of its process, a difficulty arises in enforcing their appearance. If the partner who is served and appears chooses to enter an appearance for his copartners, he may do it, and his act will be binding upon them (e); but he cannot be compelled to do so. However, in the event of his refusal to enter a joint appearance, the plaintiff is not destitute of compulsory means to enforce obedience to his writ. He may either proceed to outlaw those who do not appear, or he may distrain (g) the joint effects in this country,

(a) *Lloyd v. Ashby*, 2 Car. & Pa. N. P. C. 138.

(b) See the mode of proceeding in such cases, *Tidd's Pract.* (7th ed.) 342. *et seq.*

(c) See 12 Geo. 1. c. 29. and 5 Geo. 2. c. 27.

(d) *Pr. Reg.* 301.

(e) *Harrison v. Jackson*, 7 T.R. 207. *Dict. Dampier*, arg.

(g) Where a defendant is abroad, a plaintiff may, notwithstanding the stat. 51 Geo. 3. c. 124, issue a distringas for the purpose of compelling his appearance thereby. *Nicholson v. Bownass*, 3 Price, 263. *S. P. Dwerryhouse v. Graham*,

and thereby endeavour to compel an appearance. If joint property can be found, the latter is the more speedy process, and courts are more disposed to favour it than the remedy by outlawry. In one case (*a*), where an appearance was attempted to be enforced by distress, the Court of Common Pleas decided, that if three partners (two of whom reside abroad and one in *England*) be sued for a partnership debt, and the partner resident in *England* appear to the action, but refuse to appear for his partners who are abroad, the sheriff, under a *distringas* against the two partners, may take partnership effects, though paid for solely by the partner in this country, to whom the partnership was largely indebted. But if no joint effects are to be found, the only mode of proceeding for this purpose is by outlawing the defendant who is abroad, since the partner here is not bound to appear for him, nor can the separate property of the one be attached under a writ of *distringas* issued with the view of enforcing the appearance of the other partner. (*b*) We have already observed, that before a plaintiff can proceed solely against the defendant who may have appeared, he must carry the action on through the whole line of process to an outlawry against those upon whom, either in consequence of their absconding, or their residence abroad, the writ cannot be executed. (*c*) And courts of law have shown an inclination to assist a plaintiff who is reduced to the necessity of proceeding to such an extremity against one or more of his joint debtors. Therefore, where, on a writ against three, one was arrested and lay in gaol, and the other two absconded, the Court of King's Bench refused to discharge the prisoner, notwithstanding, according to the practice of the court, the time for declaring against him had expired; observing, that he must appear for all, or lie in gaol until the other two were outlawed. (*d*) In such a case, however, the plaintiff must move the court, or apply to a judge, for time

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Id. 266. n. Even where one partner is absent on business, and not for the purpose of avoiding the action, a plaintiff may issue a *distringas* for default of appearance, after the usual service on the other partner. *Macmurdo v. Birch*, 5 Price, 520.

(*a*) *Morley v. Strombom*, 3 Bos. & Pul. 254.

(*b*) *Goldsmith v. Levy*, 4 Taunt. 299.

(*c*) See *Tidd's Pract.* (7th ed.) 148. and the cases there cited. *Darwent v. Walton*, 2 Atk. 510.

(*d*) *Per Cur. E.* 12 Geo. 3. K. B. 2 Crompt. 9. *Barnes*, 396. 401. 2 Blacks. Rep. 759.



to declare against the prisoner, until the outlawry or appearance of the other defendants (*a*); and must show that he is using all due diligence in proceeding against them. (*b*)

Having seen what responsibilities partners incur to third persons, either by their own joint acts, or by the act of an individual member of the firm, and having also pointed out the method to be adopted to compel the appearance of partners to an action instituted against them, we will now inquire, what is the consequence of a nonjoinder of any one or more of the partners, when a joint contract or security is attempted to be enforced. In this respect, the case of partners, who have to sustain the character of plaintiffs, differs essentially from that, in which they appear upon the record as defendants. In the former instance we have explained (*c*), that although a defendant may plead the nonjoinder of a copartner in abatement, he is not compelled to do so; he may reserve his objection, and avail himself of it in any stage of the proceedings. But in the latter case, partners must take advantage of the objection, that all the contracting parties are not sued, by a plea in abatement, and it is available in that way only, though the plaintiff knew and even contracted with the other partners. Formerly, and especially in cases of contract, the law was otherwise, and on the mistaken and unfounded assumption that such matter could not be pleaded in abatement (*d*), it was held, that if it appeared at the trial that there was a joint contract, and only one of the contracting parties was sued, it was a decisive objection against the plaintiff's action,

(*a*) *Per Cur.* E. 12 Geo. 3. K. B. 2 Crompt. 9. Barnes, 396. 401. 2 Blacks. Rep. 759. Sykes v. Bauwens, 2 New Rep. 404. Morton v. Grey, 9 B. & C. 544.

(*b*) Tidd's Pract. (7th ed.) 428.

(*c*) See *ante*, p. 134.

(*d*) That the nonjoinder of a joint contractor was the proper subject of a plea in abatement, appears from the year books. Mich. 35 Hen. 6. 38. If one brings debt against another, and declares for the price of a horse, it is a good plea in *abatement* to say, that the defendant and another bought the said horse. S. C. cited Bro. Tit. Briefe, 37. So Tr. 9 Edw. 4. 24. b. writ of debt brought against B, and plaintiff declares on a contract; the defendant says that the contract was made by him and one C, still living, and not named in the writ; upon which the writ *abated*. Afterwards C dies, and a new writ is brought against B. upon the same contract, he shall be received to wage his law, although he hath before acknowledged the contract, for he may have since discharged it. And again Pasch. 10 Ed. 4. 5. In writ of *account* against me as receiver, it is a good plea that I and another were the receivers who is still living; judgment of the writ. For thereby I shall compel, the plaintiff to charge another as well as me; and besides he may have some matter of discharge of which I have no knowledge. — See the judgment of *Mansfield C. J.*, in *Powell v. Layton*, 2 New Rep. 365.

the rule then being unconditionally, as it is now restrictively, that in actions upon contracts, every partner *must* be made a defendant. (a) The adherence to that rule, and the mode in which the objection was allowed to be taken, namely, by giving it in evidence under the plea of *non assumpsit*, occasioned many nonsuits, much vexation, and a great hinderance to justice. The rule itself must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand: but experience has shown that convenience, as well as justice, lies the other way. A creditor knows with whom he deals, but he may not know the secret partner. He might therefore, under the practice as it formerly prevailed, have been subjected to many nonsuits before he ascertained who all the partners were; or might indeed have been driven to the necessity of instituting a suit in equity for a discovery of the persons constituting the firm. That rule, in its application, was consequently attended with the greatest hardship, since a *bonâ fide* creditor was burthened with the expense of nonsuits, in favour of a defendant, who was certainly liable to pay his whole demand, and who could not be injured by being sued singly, because, whatever he paid, he must have had credit for in his account with the partnership. The injustice of such a rule, and the great inconvenience of such a mode of litigation, founded, not upon the merits of the case, but upon the form of proceeding, did not escape the acute penetration of Lord *Mansfield*. For him it was reserved to abolish the unjust and oppressive practice which had obtained the sanction of his predecessors, and by the substitution of a rule more consonant to the principles of justice, and more salutary in its effects, to defeat the endless vexation to which creditors were exposed. For the convenience of suitors, he therefore laid down, that a defendant must take advantage of the objection at the beginning of the suit, by pleading it in abatement (b); and this rule has universally obtained the approbation of and has been adopted by succeeding judges. (c)

(a) *Boson v. Sandford*, Skin. 278. S. C. 3 Lev. 258. Carth. 58. 2 Show. 478. See also *Sheppard v. Baillie*, 6 T. R. 329.

(b) *Rice v. Shute*, 5 Burr. 2611. S. C. 2 Blacks. Rep. 695.

(c) *Abbott v. Smith*, 2 Blacks. Rep. 947. *Buddle v. Wilson*, 6 T. R. 369. *Scott v. Godwin*, 1 Bos. & Pul. 67. *Govett v. Radnidge*, 3 East, 62. *Powell v. Layton*, 2 New Rep. 372. *Byers v. Doby*, 1 H. Bl. 236. *Sutton v. Clarke*, 6 Taunt. 29. See also 1 Wms. Saund. 290. Cases of fraud are necessarily excepted out of

Debts, therefore, contracted by partners in trade, are joint debts, for which an action can only be maintained against all the partners, or the surviving partners jointly, provided the exception, in the event of a nonjoinder, is properly taken by a plea in abatement. But the objection is available only by a plea in abatement, and advantage cannot be taken of it under the general issue, the omission to plead in abatement being considered as an absolute waiver of the objection. (a) Nor is there any injustice in this rule. An opportunity is afforded to the defendant of insisting that the co-contractors shall be joined with him in the suit, but, at the same time, it is so regulated as to avoid the delay and expense of a trial. The creditor is also protected against the consequences resulting from the former practice; for as a plea in abatement must give the plaintiff a better writ or count, and must be certain in every particular, the defendant is bound to plead the whole truth of the case, and disclose, on the face of his plea, who are the persons liable. He cannot turn the plaintiff round more than once, by setting up fresh partners in abatement of every new action. If his plea be untrue in point of fact, as if he plead a partnership between himself and another, and he has two partners, the plaintiff may take issue on the plea, and if it be found that he has two partners, the plaintiff will be entitled to judgment, since the plea which imports that he has only one is disproved. (b) And the plea to be sustainable must answer the whole of the writ or declaration; for although it professes to answer the whole, yet if, in fact, it answers only a part, there must be judgment of *respondeat ouster*. Therefore, where, on a writ in debt for a certain sum, the plaintiff declared in the first count for part of it *borrowed* by the defendant of the plaintiff, and in a second count for the residue of the sum for *interest* of money lent by the plaintiff to the defendant, and the defendant pleaded in abatement of the writ that "the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from plaintiff," was borrowed by defendant and others, and not by defendant separately: on demurrer, because the plea answered

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the general rule. Therefore, where one partner fraudulently makes a contract in the joint name, in an action against himself singly, he cannot plead the nonjoinder of his copartners in abatement. *Hudson v. Robinson*, 4 Mau. & Selw. 475.

(a) *Id. Ibid.* See also *Wright v. Hunter*, 1 East, 20.

(b) *Abbott v. Smith*, 2 Blacks. 947. *Godson v. Good*, 6 Taunt. 587. S. C. 2 Marsh. 299.



only the cause of action mentioned in the first count, the court held the plea bad. (a) So a plea in abatement for nonjoinder will not be upheld, where, by the evidence adduced in the cause, it appears that the defendant has treated the demand made upon him as one for which he was individually and not jointly responsible. Thus where, in an action of assumpsit, the defendant pleaded that the promise was made jointly by himself and two others who were alive, and after the defendant had proved that he had two partners, the plaintiff produced several letters from him, which were signed in his own name, and in which he individually promised to pay the debt in question, without making any mention of his partners, Lord *Ellenborough* held the letters conclusive evidence that the debt was due from the defendant individually, and not from the partnership, and would not permit him to show, that it was due jointly from himself and his partners. (b) And where an action was brought against one defendant who pleaded a similar plea, it was held that an account kept by the defendant only in a pass-book between him and the plaintiff at the bankers of the former, was strong evidence to show that the credit was given to the defendant alone. (c) But in support of such a plea, it is said to have been ruled at *Nisi Prius*, and afterwards to have been decided upon a motion for a new trial, that where the plaintiff's particular contains items which are owing from the defendant jointly with the partner who is not sued, the defendant will be entitled to a verdict, although the plaintiff should be prepared to prove that some of the items were furnished on the credit of the defendant only. (d) Pleas of this description, being considered as dilatory, are not much favoured by the courts; and in one case (e) where a defendant pleaded in abatement, that others were jointly liable with himself, and the plaintiff applied to the defendant's attorney to give the places of abode and additions of those persons, which he refused to do unless the action were discontinued, the Court of King's Bench intimated, that if the defendant persevered in such refusal, the plea should be set aside. But, to proceed to the discussion of the rule itself, it is not confined to actions on simple contracts, but

(a) *Herries v. Jameson*, 5 T. R. 553. ; and see *Thomas v. Heathorn*, 2 B. & C. 477.

(b) *Murray v. Somerville*, 2 Campb. 99. n.

(c) *Robey v. Howard*, 2 Stark. N. P. C. 555.

(d) *Colson v. Selby*, 1 Esp. N. P. C. 452.

(e) *Taylor v. Harris*, 4 B. & A. 93.

applies as forcibly where specialties or instruments in writing, either under or not under seal, executed or made jointly by two or more are put in suit. The reason indeed is analogous in both cases. If it do not appear on the face of the declaration, that the instrument declared upon created a joint obligation, the record is not falsified if, at the trial, the obligation be proved to have been joint. In such a case there is no variance, the contract proved and the contract laid being the same, and the objection being merely, that the persons making it are different, which is precisely the case contemplated by Lord *Mansfield* when he reformed the former practice. (a) Therefore, if a bill of exchange, stated to be accepted by three persons, be proved to have been accepted by the three jointly with a fourth (b); or if, being alleged to have been drawn by the defendant singly, it be shown to have been drawn by him and another (c), there is not in either of these cases such a variance between the allegation and proof, as will be available to the defendant at the trial, if he have neglected to plead the nonjoinder in abatement. So where the plaintiff declared on a bond made by the defendant, to which *non est factum* was pleaded; the jury found specially that the bond was a joint bond, made by the defendant and another to the plaintiff, and it was adjudged that the plaintiff should recover: "because when two men are *jointly* bound in one bond, although neither of them is bound by himself, yet neither of them can say that the bond is not his deed; for he has sealed and delivered it, and each of them is bound in the whole." (d) Proving that another person contracted, does not negative that the defendant himself contracted. And it is now indisputably settled, that in all cases of a joint obligation or deed, or a joint contract in writing or by parol, if one only be sued he must plead the matter in abatement, and cannot take advantage of it afterwards upon any other plea, or in arrest of judgment, or give it in evidence at the trial as a bar to the action. (e). Even to contracts raised *in invitum* of the contractors the rule extends. Thus in an action of debt on the statute of

(a) *Germaine v. Frederick*, cited 1 Williams' Saunders, 291. (c).

(b) *Mountstephen v. Brooke*, 1 B. & A. 224. See *Rex v. Powell*, 1 Ryan & Mood, 101.

(c) *Evans v. Lewis*, cited 1 Williams' Saunders, 291. (d.) *Wilson v. Reddall*, Gow N. P. C. 161.

(d) *Whelpdale's case*, 5 Rep. 119. See also *South v. Tanner*, 2 Taunt. 256.

(e) *Cabell v. Vaughan*, 1 Wms. Saund. 291. (b.)

*Anne* (a) by the loser to recover money lost at play, the defendant may plead that all the winners are not joined with him, and his plea will be available, because the statute gives the action on the idea of there being a contract which the act of parliament itself raises. (b)

But although a contract may be declared upon as separate, and it will, notwithstanding, be supported, if it be proved to have been joint, provided the variance does not appear on the declaration, or any other pleading of the plaintiff; yet it will be error if a joint contract is set forth in the pleadings, and it appears from thence that the co-contractors, who are omitted as defendants, are alive. There a difference appears upon the face of the record; the plaintiff himself shows that another ought to be joined: he has a better writ, according to his own statement, and it would therefore be absurd to call upon a defendant to plead an admitted fact in abatement, the sole object of which plea is merely to introduce on the record some new additional fact, which gives to the plaintiff a better writ. (c) In such a case, a defendant, not being permitted to plead the variance between the writ and the declaration (for a plea in abatement of the writ could not be sustained) (d), may take advantage of the omission by demurrer, or he may move in arrest of judgment, or sustain a writ of error. (e) But where the instrument, which is the foundation of the action, is a joint bond or deed, it must, to enable the defendant to take advantage of the nonjoinder, otherwise than by a plea in abatement, appear upon the record, not only that the co-obligor or co-covenantor is *alive*, but that he *sealed* or *executed* the bond or deed. (g) Those are facts which, if the defendant plead in abatement, are absolutely necessary to be averred by him in his plea; and unless the plea in abatement is rendered unnecessary by the admission of the plaintiff, in his pleadings, of the facts which ought and must be pleaded, the defendant cannot avail himself of the objection, except in the ordinary method. There are, indeed, two cases which seem to militate against this rule, in which it neither appeared that the co-obligors *sealed* the bonds, or were *alive* at the commencement of the suit; but the actions were, never-

(a) 9 Ann. c. 14.

(b) *Bristow v. James*, 7 T. R. 257.

(c) *Scott v. Godwin*, 1 Bos. & Pul. 67.

(d) *Id. Ibid.*

(e) 1 Chitt. on Pl. 32. *Anderson v. Martindale*, 1 East, 497. *South v. Tanner*, 2 Taunt. 254.

(g) *Horner v. Moore*, cited 5 Burr. 2611.



theless, considered respectively abateable, on account of the non-joinder. In the one (*a*) where, to an action of debt on bond, the defendant pleaded a release, the plaintiff prayedoyer; and, onoyer, it appeared that the plaintiff had released the defendant from all bonds, except one for 40*l.*, wherein defendant and one T. O. stood bound; and the plaintiff replied, that the excepted bond, and the bond declared upon, were the same bond: the court, on demurrer, said, that the plaintiff himself having admitted, by his deed, that two were bound, ought to have brought his action against both. But this determination is impeached by Sir William Jones (*b*), who says there was no resolution upon that point, and that the *Chief Justice* was absent. In the other case (*c*), a *scire facias* was brought against two defendants, stating that they, and two other persons, by bond sealed with their seals, became jointly and severally bound to the king in a certain sum of money, stating nonperformance, &c.; and the court were of opinion, that as abateable matter appeared on the *scire facias*, it was not necessary for the defendant to plead in abatement, and they gave judgment that the *scire facias* should be quashed. However, notwithstanding these cases, the better opinion seems now to be, that, unless the facts necessary to be pleaded are disclosed and admitted by the plaintiff in his pleadings, the defendant is not entitled to take an objection to the nonjoinder otherwise than by a plea in abatement. (*d*) In the case of a joint contract there is this objection to the nonjoinder of one or more of the several parties liable, that if judgment be obtained against one, in a separate action against him upon such contract, the plaintiff may experience difficulty in afterwards proceeding against the parties omitted. (*e*) Where a plaintiff, by reason of the statute of limitations, or of the 9 Geo. 4. c. 14. (which declares even a written acknowledgment of a debt made by one partner insufficient to revive it against the others), is barred of his remedy against the firm, but is entitled to recover against a single partner by virtue of a new acknowledgment or promise in writing, he may either maintain an action against that partner alone; and if the non-

(*a*) Hickmott's Case, 9 Rep. 52. b.

(*b*) Sir W. Jones, 304. See 8 Mod. 242.

(*c*) Rex v. Young, cited 6 T. R. 769.

(*d*) Cabell v. Vaughan, 1 Wms. Saund. 291, b. 1. Chitt. on Pl. 32.

(*e*) Com. Dig. Tit. Action, K. 4. L. 4. 1 Chitt. on Pl. 32. See also Godson v. Smith, 2 B. Moore, 157.

joinder of the others should be pleaded in abatement, entitle himself to judgment by taking issue on the plea; or he may sue all the partners, in which case the court is empowered to give judgment and allow costs for the plaintiff as to such defendant against whom he shall recover, and for the other defendant or defendants against him. (*a*)

Where one of the joint contractors dies, subsequently to the making of the contract, the survivor is alone responsible at law, the personal representatives of the deceased partners being discharged from liability. (*b*) And, if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue. (*c*) In declaring against a surviving partner, it was in an old case (*d*) said by Lord *Holt*, that "if there be two partners in trade, and one of them buy goods for them both, and the other dieth, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead and he survived." In practice, however, this rule appears to have been subsequently departed from; for when one of several joint contractors dies, the party suing usually declares on a contract with the deceased and the survivors, and not with the survivors alone (*e*); and where a debt accrues from a defendant as surviving partner, it is more proper, as far as convenience is concerned, to declare against him in that character, because the forms of declaration ought, as near as can be, to be made subservient to the information of the party charged. But, although such is the practice, it is not essentially necessary to the maintenance of the action that the contract should, in the declaration, be stated to have been joint; for if all the partners had been alive, and one only had been sued, that circumstance could be taken advantage of by a plea in abatement alone, and would be no defence upon the general issue; but inasmuch as, where one is dead, there cannot be any plea in abatement, the rule of *cessante ratione cessat lex* applies. It has, therefore, been held that, under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff may recover

(*a*) 9 Geo. 4. c. 14. s. 1, 2.

(*b*) *Godson v. Good*, 2 Marsh. 302. S. C. 6 Taunt. 587. Bac. Abr. Tit. Obligations, D. 4. Vin. Abr. Tit. Obligation, P. 20.

(*c*) *Postan v. Stanway*, 5 East, 261.

(*d*) *Hyat v. Hare*, Comb. 383.

(*e*) *Spalting v. Mure*, 6 T.R. 365. Per *Lé Blanc J.*, *Bovill v. Wood*, 2 Mau. & Selw. 25.

one demand due from the defendant individually, and another due from him as surviving partner. (a) On the death of the last surviving partner, the right of action results against his representatives, and not against them jointly with those of the other deceased partners. Therefore, where A, the partner of B, signed an agreement on the behalf of the house of A and B, and B survived A, it was determined that an action on the agreement could be maintained against the executors of the survivor only. (b)

Similar in its consequences, in some respects, to an actual death, is the civil death of one of several joint contractors. A civil death is the legal effect of an outlawry; for an outlaw, being *extra legem positus*, is, in legal contemplation, dead as regards all civil purposes. Where, therefore, one of two partners is outlawed, the fact of the outlawry affords the plaintiff an excuse for a separate proceeding against the other. An original joint liability is, indeed, assumed, although, as one necessary result of the outlawry, it cannot be jointly enforced. The plaintiff, therefore, in declaring against one partner on a joint contract, must, under such circumstances, state the contract to have been joint, and allege the outlawry of the other as a reason why the proceeding is separate. In a declaration of this description, it has been held to be insufficient to aver, that the outlaw was *in due manner* outlawed, without adding that he was outlawed *in that suit*. (c) And where, in a joint action against two, it appeared that one of the defendants had been outlawed upon different process from that by which the other was brought into court, and no connection was shown between the several writs of *capias* against each, as referable to the same *original*; as where one was outlawed upon process by *original*, tested the 10th of *April*, returnable on the first return of *Easter* term, and continued regularly down to the time of the outlawry, and the other was arrested on a special *testatum capias*, issued on the

(a) *Richards v. Heather*, 1 B. & A. 29. *Calder v. Rutherford*, 7 B. Moore, 158. *Jell v. Douglas*, 4 B. & A. 374. *Fitzgerald v. Boehm*, 6 B. Moore, 332. *Tissard v. Warcup*, 2 Mod. *contra*. A commission of bankruptcy against a person, as surviving partner of another, although a statute execution against joint and separate estate is strictly a joint commission; and if the petitioner be a joint creditor, he must claim against the joint estate. *Ex parte Barned*, 1 Glyn & James, 309. See the 6 Geo. 4. c. 16. s. 62.

(b) *Calder v. Rutherford*, 3 Brod. & Bingh. 302.

(c) *Saunderson v. Hudson*, 3 East, 144. But see Co. Litt. 128. b. 352. b.



24th of *April* in *Hilary* vacation, to which bail was put in, and the plaintiff declared against him alone, alleging the outlawry of the other defendant *in the same suit*; the Court of King's Bench set aside the declaration for irregularity. (a) But an allegation that a co-defendant was, by due course of law, outlawed at the suit of the plaintiff, *in this plea and suit*, is sufficient without a *prout patet per recordum*, because the very record before the court verifies that averment. (b) To a declaration against one, upon joint promises by him and another, whom the plaintiff avers to be outlawed, the defendant may plead *nul tiel record* of outlawry; but such a plea must conclude in abatement, and not in bar. (c) On the subject of the outlawry of one co-contractor it may here be remarked, that it has not the effect of altering the nature of the contract in any other respect, than as it empowers the plaintiff to enforce it against the other contractor. The contract being still joint, if the latter die, the remedy survives against the outlaw, and cannot be enforced against the personal representative of the deceased. Thus, where the plaintiff brought an action against two defendants, and, having proceeded to outlawry against one, prosecuted the action against the other, who died after interlocutory and before final judgment, the Court of King's Bench held, that he could not have a *scire facias* against his administrator; for, notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant. (d) And it has been determined that a judgment of outlawry against two of three joint debtors, does not make the debt a separate one, so as to enable the creditor to prove it under a separate commission against the third debtor. (e) In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take advantage of the *misnomer* of his companions, upon the general issue, on the ground of a variance between the contract declared upon, and that proved. (g)

But, notwithstanding the death or outlawry of a joint contractor, where true in fact, is sufficient to enable the plaintiff to proceed separately, in the one case against the survivor, and in the other against the co-contractor, yet the bankruptcy of a

(a) *Haigh v. Conway*, 15 East, 1.

(b) *M'Michael v. Johnson*, 7 East, 50.

(c) *Nowlan v. Geddes*, 1 East, 634.

(d) *Fort v. Oliver*, 1 Mau. & Selw. 242.

(e) *Ex parte Dunlop*, Buck, 253.

(g) *Gordon v. Austin*, 4 T.R. 611.

partner has not the same effect, if the objection to his not being joined in the action be taken by a plea in abatement. This was decided by the Court of King's Bench in a late case (*a*), in which it was held, that as joint contractors must be all sued, it is no reason for not joining a person, with whom the contract was made, that he has become a bankrupt, and has obtained his certificate; because as the bankrupt, if joined, might renounce the protection which the certificate affords him, the plaintiff ought not to be at liberty, in the first instance, to anticipate what may ultimately perhaps prove to be a discharge. But if the bankrupt be joined, and plead his certificate, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others. (*b*) And, subject only to a plea in abatement, it seems, that counts upon a promise by the defendant and another, since become a bankrupt and certificated, may, in an action against the solvent partner alone, be joined with counts on promises made by the defendant solely, since the other became a bankrupt. (*c*)

Where one of the partners or joint contractors is a minor, it does not seem to be clearly established, whether, in an action against the partnership firm, it is necessary to join him. In one case (*d*), it was said that he must be joined; but, consistently with more modern determinations, that *dictum* seems to be questionable, if it be considered as applicable to all cases in which an infant is a joint contractor. Where the action is brought against the adult members of the firm solely, and they plead in abatement that there is a another co-contractor not joined, the plaintiff, it appears, may reply, that the contractor mentioned in the plea is an infant, and the replication will be a good answer to the plea. (*e*) Such a replication excludes the idea of a concurrent liability having ever existed; and, being a negation of the joint contract attempted to be raised, affirms the contract to

(*a*) *Bovill v. Wood*, 2 Mau. & Selw. 22.

(*b*) *Noke v. Ingham*, 1 Wils. 89. If, to enable a joint creditor, who has proved under a separate commission, to recover from the solvent partners, it is necessary to join the bankrupt in the action, the creditor, where he refuses to enter a *nolle prosequi*, must indemnify the bankrupt against all the expenses of the action, and cannot take advantage of the judgment as against him. *Ex parte Read*, 1 Ves. & Bea. 346. S. C. 1 Rose, 460. See *Emmett v. Butler*, 7 Taunt. 599. S. C. 1 B. Moore, 332.

(*c*) *Hawkins v. Ramsbottom*, 6 Taunt. 179.

(*d*) *Ex parte Henderson*, 4 Ves. 164.

(*e*) *Gibbs v. Merrill*, 3 Taunt. 313. *Burgess v. Merrill*, 4 Taunt. 469. Anon. *cor. Le Blanc J.*, in *Banc. at Lancaster*, cited 2 Pothier on Oblig. (ed. Evans) 63. n. a. See also 2 Vin. Abr. p. 68. Tit. Actions, Joinder, (D. d.) pl. 8.

be such as it is in legal effect. It would, indeed, be an intolerable hardship, and a palpable injustice, if a plaintiff, who sued the adult debtor, should, by a plea in abatement, be compelled to proceed against the other, and having done so should be defeated (for that the infant can avoid the contract no doubt can be entertained) for want of substantiating that joint contract and joint responsibility which is requisite to maintain his declaration. So a plaintiff, who neglects to reply the infancy of the co-contractor, may show that, at the time of the contract being made, the alleged contractor was an infant, and that he has, subsequently, avoided the contract. (a) But if, instead of replying infancy, the plaintiff join issue on the plea in abatement, and is unable to establish an avoidance of the contract by the infant, he must be nonsuited, because the only fact then in issue is the existence or non-existence of a joint contractor, and that, it seems to have been considered, is proved by showing an infant co-contractor. (b) It has been laid down by Lord Ch. J. *Gibbs*, that where goods are sold to a minor upon a false and fraudulent representation by his father, that he has relinquished his business in favour of the son, the father is liable either as principal vendee, or as partner with his son. (c) And although the law, considering it against good policy that an infant should be allowed to bind himself by contracts made for goods for the purposes of trade, throws a protection around him, by holding that such contracts, entered into during his minority, shall be absolutely void and not voidable; and thence it follows that, if he becomes a member of a firm, he may avail himself of that protection by repudiating all those partnership contracts which may have been concluded during his nonage; yet the privilege necessarily ceases with the minority, and therefore if, on attaining full age, he do not disaffirm the partnership, and notify that disaffirmance to those with whom the firm previously had dealings he will be liable upon contracts afterwards made in the joint name. Thus, where an infant represented himself as in

(a) *Gibbs v. Merrill*, *ante*. S. C. cited 14 East, 214. See also *Berridge v. Merrill*, cited *ibid*. By the 9 Geo. 4. c. 14. s. 5. it is enacted, that no action shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

(b) *Gibbs v. Merrill*, 3 Taunt. 313. (c) *Biddle v. Levy*, 1 Stark. N.P.C. 20.



partnership, and continued to act in the character of a partner till within a short period of his coming of age, it was determined, notwithstanding there was not any proof of his doing any act as a partner after he attained the age of majority, that it was his bounden duty to have notified his disaffirmance of the partnership on arriving at that age; and, as he had neglected to do so, he was responsible to persons who had subsequently trusted his partner with goods on the credit of the partnership. (a) Within what period a minor, after attaining majority, should repudiate the contract of partnership, does not appear to be settled by decision; but it seems to be universally agreed, that the election, to abide by or renounce it, should be made within a reasonable time after he comes of age. And, although no precise line, as to what shall be reasonable time, has been drawn; yet, by analogy to other cases, and from what fell from the court on a late occasion (b), it may be inferred, that a week or a fortnight would be considered as reasonable. We have hitherto assumed, in the case of a member of the firm, who is a minor, that he is not made a party to the suit; but if the action be brought against him jointly with the others, and he pleads his minority in bar, to which the plaintiff replies, that he ratified the contract after he came of age, it will be incumbent on the plaintiff, in order to sustain his replication, to prove a ratification before the commencement of his action; for the adoption by the minor, after he comes of age, is binding upon him solely on the ground of his taking upon himself a new liability, upon a moral consideration existing before, but it does not admit the perpetual existence of the contract so as to revive it *ab initio* against him. (c) And if a defendant, being a minor, plead a similar plea, and the plaintiff is enabled to establish a ratification of the contract, he cannot, by entering a *nolle prosequi* as to him, continue the suit against the other defendants; because having, in his declaration, stated the contract to be a joint one entered into by several persons, by one of whom it is avoided, it would, were he to obtain a verdict against the others, be error on the record, an action, arising out of contract, which is brought

(a) *Goode v. Harrison*, 5 B. & A. 147.

(b) *Doe d. Bromfield v. Smith*, 2 T. R. 436. See also *Holmes v. Blogg*, 1 B. Moore, 466. S. C. 2 B. Moore, 552. Under a clause in articles of partnership, providing for the admission into the firm of a deceased partner's representatives, *Alexander C. B.*, has considered three months a reasonable time within which the representatives should make their election. *Pigott v. Bagley*, 1 M. & C. 569.

(c) *Thornton v. Illingworth*, 2 B. & C. 824.

against several, and cannot be supported against all, failing wholly, because the contract proved and established differs from that declared upon and assumed: he must, therefore, discontinue and bring a new action against the adult members, as being the sole contracting parties, according to the legal effect of the contract. (a) An infant partner is not compelled to plead his infancy specially, but may give it in evidence under the general issue. (b)

A plea in abatement, that there is a dormant partner not joined in the suit, who is concerned in interest with the defendants, will not, in all cases, be available; because, generally speaking, the right of the creditor to proceed against such a partner is elective and not compulsory, he being under no obligation to consider the dormant partner as his debtor. (c) Thus where, to an action of *assumpsit*, the defendant pleaded in abatement that one who jointly promised was not joined, it was held that the plea was not supported by the evidence of a secret partnership, of which the plaintiff had no knowledge, the goods having been ordered by the defendant alone. (d) So where the part-owner of a ship orders supplies in his own name, he cannot plead the non-joinder of co-partowners of whose existence the creditor was not apprized. (e) And if the members of whom the firm apparently consists are expressly named, as if it be represented to be composed of A and B, a creditor, dealing with them in ignorance of a dormant partner, cannot be compelled in an action against them to join C, on account of a secret interest he may possess as partner. In such a case the creditor has the option of joining him or not, as he thinks proper: he may proceed against him when he is discovered, notwithstanding he was unknown to be a partner at the time of furnishing the subject matter of the debt; but he is not bound to do it, inasmuch as the dormant partner was not only not an ostensible contracting party, but his interest was pur-

(a) *Jaffray v. Fairbairn*, 5 Esp. N. P. C. 47. *S. P. Chandler v. Parkes*, 3 Esp. N. P. C. 76.

(b) *Season v. Gilbert*, 2 Lev. 144. *Howlett v. Haswell*, 4 Campb. 118.

(c) *Grellier v. Neale*, Peake's N. P. C. 146. *Robertson v. Wilkinson*, 3 Price, 538. *Ex parte Matthews*, 3 Ves. & Bea. 126.

(d) *Stansfeld v. Levy*, 3 Stark, N. P. C. 8. In this case it was also held that the plaintiff was not called upon to go into his evidence upon the plea: but after proof of the supply of the goods, he might reserve it in reply to the defendant's case.

(e) *Baldney v. Ritchie*, 1 Stark. N. P. C. 338. *S. P. Doo v. Chippenden*, Abbott, L. S. part 1. c. 3. s. 8.

posely and professedly concealed. (a) But where the firm is described as consisting of A *and company*, which of itself indicates that some other or others besides A are interested, and a creditor deals with that firm, without inquiring who are the actual partners, there, as he might have ascertained the fact had he used due diligence, the partners who are sued may perhaps insist on a dormant partner being joined with them. (b) And in a late case, it was held, that unless the interest of the parties is materially altered by the plea, and the defendant subjects the plaintiff to no other inconvenience but that of joining another person, a dormant partnership may be pleaded in abatement (c): and it was also laid down, that there is not any injustice in admitting such a plea for the purpose of a set-off (d); but Lord Eldon has frequently expressed his disapprobation of this decision, and his determination not to adhere to it. (e) And its authority has been further impugned in a recent case, in which it was held, that the non-joinder of a dormant partner cannot be pleaded in abatement, but it is for the jury to say with what parties the contract was intended to be made. (g) Where goods were consigned to two, for sale by commission, on a dissolution of partnership the sale was assumed by one, and it was held, that after the sale he was rightly sued for money had and received, which action could not have been maintained against both, although an action for not accounting would have lain against both. (h)

The rule of law, that the action ought regularly to be brought against all the persons who contracted with the plaintiff, applies with equal force to an unincorporated company; and therefore to an action against some of the members of such a company, upon a contract legally made with the whole body, the defendants may generally plead the non-joinder of the other members in abatement. (i) And, it is apprehended, that if the

(a) *Ex parte Layton*, 6 Ves. 438. *Ex parte Hamper*, 17 Ves. 412. *Hoare v. Dawes*, 1 Dougl. 371.

(b) *Ex parte Layton*, *supra*. *Davies v. Hawkins*, 3 Mau. & Selw. 433. See *Robertson v. Wilkinson*, 3 Price, 538.

(c) *Dubois v. Ludert*, 1 Marsh. 248. S. C. 5 Taunt. 609. (d) *Id. ibid.*

(e) *Ex parte Hodgkinson*, 19 Ves. 294. S. C. Coop. Ca. 101. *Ex parte Norfolk*, 19 Ves. 458. *Ex parte Watson*, *Id.* 462.

(g) *Mullet v. Hook*, 1 Mood. & Malk. 88.

(h) *Wells v. Ross*, 7 Taunt. 403.

(i) In *Cousins v. Smith*, 13 Ves. 542, Lord Eldon seems to have been of opinion,



defendants do not, on the face of their plea, disclose all the persons liable, and the plaintiff is induced to discontinue and begin *de novo*, joining all the parties in conformity to the plea, as the plea would not help him to prove them to be alone jointly concerned, it will still be competent to them, in abatement of the second action, to plead, that there are other contractors not joined, and those other contractors, if they are afterwards sued, may in like manner avail themselves of a similar plea. But a plaintiff may always secure himself against a repetition of such pleas, if true in fact; for, as the plea by the defendants to the action originally brought, that they jointly with certain others contracted, imported that they jointly with those others, and no more, contracted (*a*), the plaintiff, by controverting the truth of that plea in his replication, would entitle himself to a verdict; because the defendants to establish it, must prove that the persons named, and no others, jointly contracted with them. And we have already seen, that a court of law will assist a plaintiff whose claim is attempted to be defeated by a plea of this description, and, as the condition of allowing the plea to stand, will order that the particulars of the places of abode and additions of those, whose non-joinder forms the subject of the plea, shall be furnished to him. (*b*) Joint stock companies, however, frequently obtain from parliament the privilege of being sued by their secretary; but whenever that privilege has, in modern times, been conferred, the legislature, with the view of assisting the plaintiff with the remedy he previously possessed at common law against each of the members of the company, has been careful to provide that execution upon a judgment against the nominal defendant may be taken out against any member of the society, and that the names of the members shall be enrolled. (*c*)

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that in an action by the committee of a voluntary society, the plaintiffs would not be liable to a nonsuit at law, and that an action against such a committee could not be defended on the objection that all the members were not joined.

(*a*) *Godson v. Good*, 6 Taunt. 587. S. C. 2 Marsh. 299.

(*b*) *Taylor v. Harris*, 4 B. & A. 93.

(*c*) In the acts of parliament granted to several of the more recent institutions, the legislature has caused the following provisions to be inserted, viz.

“ That execution upon any judgment in any action obtained against the person acting as chairman of the society or partnership for the time being, or against the person acting as secretary of the society or partnership for the time being, whether as plaintiff or defendant, may be issued against any member or members for the time being of the society or partnership: provided always that every such chairman or

But the provision respecting enrolment does not exempt a member, whose name is not enrolled, from the liabilities that would otherwise attach to him; for, if that were so, non-observance of the act would free the party, neglecting to observe it, from responsibility; that provision only negatives proceedings by the company under the authority of the act until there has been an enrolment. (a)

In actions *ex quasi contractu* it is not clearly established whether a plea in abatement for the non-joinder of parties can be pleaded. Formerly it was considered that it might, and the authorities on the subject were uniform and unimpeached until a late case (b), in which it was held, that such a plea was not tenable; but the propriety of this decision has been questioned (c), and the majority of authorities are in favour of such a plea. The Court of King's Bench, in the leading case on this subject (d), were agreed that, at some stage of the proceedings,

secretary, in whose name any such action or suit shall be commenced, prosecuted, or defended, and every such member or members against whom execution upon any judgment obtained in any such action shall be issued as aforesaid, shall always be reimbursed and paid, out of the funds of the society or partnership, all such costs and charges as by the event of any such proceedings he or they shall be put unto or become chargeable with."

"That a memorial of the names of the several persons being members of the society or partnership, in the form expressed in the schedule annexed, shall be enrolled upon oath in the High Court of Chancery, within three months after the passing of the act; and when any transfer of any share or shares of any member of the society or partnership shall be made, a memorial thereof shall in like manner be enrolled as aforesaid, in the form and to the effect expressed in the said schedule."

"That until such memorial as before mentioned shall have been enrolled in the manner herein directed, no action shall be brought by the society or partnership under the authority of the act; and all the members whose names shall be expressed in the last enrolment, shall continue liable to all actions, suits, judgments, and executions, until a memorial or memorials of transfer shall have been enrolled as aforesaid."

"That nothing in the act contained shall extend, or be deemed, construed, or taken to extend to incorporate the society or partnership, or to relieve or discharge the society or partnership, or any of the members thereof, or subscribers thereto, from any contract, duty, obligation, or responsibility whatsoever, which by law they now are, or at any time hereafter may be subject or liable to, either as between such society or partnership and others, or among themselves, or in any manner whatsoever." See 54 Geo. 3. c. 79. s. 2, 3, 4. and 7.

(a) *Natusch v. Irving*, Appendix, *post*. (b) *Govett v. Radnidge*, 3 East, 62.

(c) *Powell v. Layton*, 2 N. R. 372. *Max v. Roberts*, ibi. 454.

(d) *Boson v. Sandford*, 2 Show. 478. ; reported also in *Skin. 278.* 3 Lev. 258' Carth. 58. Salk. 440. 3 Mod. 321. 1 Show. 29. 101.

the defendant may object that the suit is not against all the partners, although three of the judges (a) mistakenly supposed that, in an action against one, the circumstance of the contract declared upon being joint could not be made the ground of a plea in abatement. It has, indeed, been objected to the authority of this case, that the case itself has, by subsequent decisions, been shaken to its foundation in the main points which it assumed to determine; for that the omission to join all the partners or part-owners is a matter pleadable in abatement, and which, in that mode only, and not by giving the matter in evidence, could be taken advantage of; both which points were however otherwise holden in that case. (b) But it may be doubted whether such an argument successfully impeaches its authority, when it is remembered that, at the time that decision took place, a plea in abatement for the non-joinder of joint contractors was not used in actions of *assumpsit*. For that form of action such a plea was not introduced until the time of Lord Mansfield (c), although formerly, when it was usual to declare in debt on a simple contract, such pleas have been known. (d) It seems also to be conjectural what the form of the action in that case was. Lord Ellenborough considers it to have been an action of *assumpsit* (e); Lord Kenyon has said that it was treated by the whole court as an action for a breach of contract (g); while Mr. Justice Chambre (h) imagines that it was considered by all the parties as an action on the case, and conceives it impossible for Lord Ch. J. Holt to have denominated it *quasi ex contractu*, if, in truth, it was contract. But whatever may have been its form, it has been regarded and acted upon as an authority, establishing, that advantage may be taken of the non-joinder of all the parties in actions upon a matter founded in contract, though the form of the action be case for malfeasance or nonfeasance, and the plea not guilty; and later cases, not without contradiction, have decided, that the mode in which that advantage shall be

(a) According to the report of this case in 3 Mod. 321., Mr. Justice Dolben was the only judge who thought this matter could be pleaded in abatement.

(b) Per Lord Ellenborough, *Govett v. Radnidge*, *supra*.

(c) *Rice v. Shute*, 5 Burr. 2611. S. C. 2 Blacks. 695. See also *ante*, p. 166.

(d) *Powell v. Layton*, 2 N. R. 372.

(e) *Govett v. Radnidge*, *supra*.

(g) *Mitchell v. Tarbutt*, 5 T. R. 649.

(h) *Powell v. Layton*, *supra*.



taken must be by a plea in abatement. (a) In the case of *Buddle v. Wilson* (b), although the point did not necessarily come in judgment, the court gave a clear intimation of opinion that to an action against a carrier, in case on the custom of the realm, for not safely carrying goods, the defendant, where the *gist* of the action is founded in contract, may plead in abatement the non-joinder of his partners. So, in a still later case (c), which was an action on the case in the form of *tort*, against one of several ship-owners for not safely conveying goods which had been delivered to him by the plaintiff for the purpose, the declaration having stated a particular employment without alleging the ship to be a general ship carrying the goods of all who chose to send them, and the defendant having pleaded, in abatement, that there were other part-owners not joined, the Court of Common Pleas, on demurrer to the plea, decided, that the plea was maintainable, and gave judgment for the defendant. And in a subsequent case (d) the Court of Common Pleas, adhering to their former determination, decided, that a plaintiff who had failed in proving all the defendants to be part-owners, must fail altogether. A writ of error was brought on this latter judgment, which was argued before the twelve judges, and it was understood that much difference of opinion existed among them; but the cause was ultimately disposed of on a different ground. (e) To these authorities, indeed, is to be opposed the determination to which we before adverted. (g) That was an action against three, wherein the plaintiff declared, that they had the loading of a hogshead of treacle of the plaintiff's, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that the defendants so negligently conducted

(a) See Com. Dig. tit. Abatement, F. s. Ib. Action on the case for negligence, C. See also D'Anver's Abr. tit. Action, p. 8, in which the case of *Boson v. Sandford* is referred to as law; and in *Dale v. Hall*, 1 Wils. 282., Mr. Justice *Denison* approves of it.

(b) 6 T. R. 369.

(c) *Powell v. Layton*, *supra*. In this case it was insisted in argument, that if the plea in abatement state the loss to have arisen in consequence of the joint negligence of all the co-contractors, the plaintiff may reply, that it was through the several negligence of one; but Lord Ch. J. *Mansfield* thought otherwise, and observed, that such a replication was never known.

(d) *Max v. Roberts*, 2 N. R. 454.

(e) *Id.* in error, 12 East, 89.

(g) *Govett v. Radnidge*, 3 East, 62. See also *Perry v. Hunwicks*, cited 6 T. R. 371. *Ansell v. Waterhouse*, 1 Chit. on Pl. 78. n. b. S. C. 2 Chit. Rep. 1.; and 6 Mau. & Selw. 385.

themselves in the loading, &c., that the hogshead was damaged, and it was decided that the *gist* of the action was the tort, and not the contract, out of which it arose; and therefore, that, on the plea of not guilty, two being acquitted, judgment might be had against the third, who was found guilty. But, in another case which came under the consideration of the Court of King's Bench (*a*), wherein the declaration expressly alleged a bargain, and complained of a deceitful warranty in the nature of a wrong, the action being against two persons, and the plaintiff proving a sale by one alone, that court held that he could not succeed against that one, but must wholly fail. (*b*) This last case, however, is not to be considered as weakening the authority of *Govett v. Radnidge*, or as adopting that of *Powell v. Layton*. For the case of *Weal v. King* was matter of contract merely, and was only formally turned into a tort. The main question, therefore, still remains undecided.

But whatever may be the existing difference of opinion as to the necessity of joining all the partners in actions of the description we have just noticed, where the defendant who is singly sued pleads in abatement, yet in actions arising *ex delicto*, or for torts unconnected with contract, such as trespass, trover, case for malfeasance, and the like, no such difference of opinion exists, the rule being clear and uniform, that in such actions a plaintiff may, at his option, consider the tort or trespass as being either joint or several, and accordingly sue all or any of the tortfeasors or trespassers. (*c*) In such a case there is a right of action for the whole damage against any one of the persons liable, a separate tort or trespass attaching upon each of the wrong-doers individually; and if sued alone, he cannot plead the non-joinder of the others in abatement or in bar, or give it in evidence under the general issue; for a plea in abatement can only be adopted in those cases where regularly all the parties *must* be joined, and not where the plaintiff *may* join them all or not at his election. (*d*) Therefore (*e*), to an action on the case against the defendants, part-owners of a ship, for the negli-

(*a*) *Weal v. King*, 12 East, 452.

(*b*) See also *Green v. Greenbank*, 2 Marsh. 485.

(*c*) *Rice v. Shute*, 5 Burr. 2611. *Bristow v. James*, 7 T. R. 257. *Attorney-General v. Burges*, Bunb. 223. Co. Lit. 232. a. *Morrow v. Belcher*, 4 B. & C. 704

(*d*) *Child v. Sands*, Carth. 294. *Cabell v. Vaughan*, 1 Wms. Saund. 291. c *Leslie v. Wilson*, 6 B. Moore, 426.

(*e*) *Mitchell v. Tarbutt*. 5 T. R. 649.

gence of their servant in running down a ship laden with sugar belonging to the plaintiff, whereby the sugar was lost, the defendants, it was decided, could not plead in abatement, that there were other part-owners not joined in the suit, because the action being *ex delicto*, the trespass was several. And in an action on the case against common carriers, charging them with a breach of duty imposed by the custom of the realm, or, in other words, by the common law, and which, therefore, being a breach of the law, does not require the aid of a contract to support it, a verdict may be found for some and against the rest of the defendants, and if judgment be entered accordingly it is not erroneous. (a) Nor in such an action is it material whether the tort were committed by the partners personally or by their servant in the prosecution of their business; since, in the latter case, the rule of law, *qui facit per alium facit per se*, applies, and renders them, or each of them, responsible for the consequences. And this is not a mere formal distinction: it applies substantially as regards the person who is the object of the suit; for if damages be recovered against him, and he be enforced to pay them, he cannot afterwards compel his copartners to contribute their proportion of his disbursement, since, in actions founded in tort, each wrong-doer being separately responsible, a contribution cannot, by law, be claimed as between them. (b) It has been said, that if the plaintiff himself, on the face of his declaration, state that others beside the party who is sued committed the trespass, his action abates (c); but there does not seem to be any good ground for this distinction. (d)

Independently of a plea in abatement, of which, when not jointly sued, we have seen partners may avail themselves, every other defence which may be urged by an individual in answer to an action commenced against him, is open to persons who are called upon jointly to perform a contract. If any thing operating as a bar to the action exists, it is equally conclusive when propounded by many defendants, as it is when pleaded by one

(a) *Bretherton v. Wood*, 6 B. Moore, 141. In an action of tort against several, there cannot be a nonsuit as to one, and a verdict against the others. *Revett v. Browne*, 2 Moore & Payne, 18.

(b) *Merryweather v. Nixan*, 8 T. R. 186. *Lingard v. Bromley*, 1 Ves. & Bea. 117. But see *Woolley v. Batte*, 2 C. & P. N. P. C. 417. and *ante*, p. 87.

(c) *Brickhead v. York*, Hob. 199.

(d) *Cabell v. Vaughan*, 1 Wms. Saund. 291. c.



who is singly sued. Partners, therefore, like individuals, may plead whatever bars the plaintiff's action or reduces his demand. For instance, a release to one partner may be pleaded in bar of an action against the others; for there being but one duty extending to all, a release to one inures to the benefit and is a discharge of all the partners. And it is immaterial whether the release be by deed or by operation of law (*a*); for a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged. By the civil law, a release to one joint debtor was considered as operating the discharge of the others; *si ex pluribus obligatis uni accepto feratur, non ipse solus liberatur, sed et hi qui secum obligantur; nam cum ex duobus pluribusque ejusdem obligationis participibus uni accepto fertur, ceteri quoque liberantur: non quoniam ipsis accepto latum est, sed quoniam velut solvisse videtur is, qui acceptilatione solutus est.* (*b*) In conformity with this, and according to the law of *England*, if two or more are jointly and severally bound in a bond or personal obligation, a release to one discharges the other or others; for, in such a case, the joint remedy being extinguished, the several remedy is likewise destroyed. (*c*) The same rule holds in the case of all joint and several contracts, a release to one of many joint and several debtors of his or any part of his liability being equally available to the others as it is to the party actually released. In a very old case (*d*), it is laid down, that if two receive a sum of money jointly, and each of them binds himself to account for the whole, and afterwards a writ of account is brought against them by divers *præcipes*, and they are counted against severally as receivers of the said sum, a release made to one of them of all debts and accounts shall be a release to the other also. So, if several persons commit a joint trespass, a release to one is a discharge to all the others. (*e*) And even if the release be to one, with a *proviso* that the other shall not take advantage of it, it has been said the *proviso* would be void and the release would discharge

(*a*) *Cheetham v. Ward*, 1 Bos. & Pul. 630.

(*b*) *Inst. lib. 16. ff. de tit.*

(*c*) *Co. Litt. 232. a. Bac. Abr. tit. Release, G.*

(*d*) 2 Ed. 3. 40 b. *Vin. Abr. tit. Release, G. a. pl. 7. 2 Rol. Abr. 412.*

(*e*) *Co. Litt. 232. a. Hob. 66. 2 Roll. Abr. 412. Vin. Abr. tit. Release, G. a. pl. 1.*

both. (a) This rule prevails in equity (b), as well as at law ; but it does not apply in every case of a personal discharge, since the legal effect of a release may be countervailed by express declaration, and when the release is special and personal in its nature it must be construed according to the particular purpose and intent for which it was made. For instance, where one of two partners obtained from a creditor a general release by deed, in which it was expressly provided that its operation should not extend to prejudice any demands which the creditor had either separately or jointly against the other partner, nor should it affect his claims against the joint effects; and there was a farther stipulation, that the creditor might commence an action at law

(a) Lit. Rep. 190. The following note by Lord Nottingham on this subject is inserted in Mr. Hargrave's edition of Co. Litt. 232. a.—26. H. 6. T. Barre, 37. : — Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a good plea in bar. Nota, each was bound in the entirety, therefore it was joint and several. 34. H. 6. So in the case of the king; if he releases to one of the obligors, the other shall take advantage of it. 5 Rep. 56. contra. — And as a release in deed to one obligor discharges the other, so of a release in law, as 8 Rep. 136. Needham's case. A woman obligee marries the obligor, that is another sort of discharge, 264. b. But 17 Car. B. R. two were bound jointly and severally. The plaintiff sued both, and afterwards entered a *retraxit* against one; whether that discharged the other was the question. Berkeley said it was, for it amounts to a release in law, as the plaintiff confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in Hickmot's case, 9 Rep. and *retraxit* is a bar to an action; and the plaintiff by his own act has altered the deed from joint to several, and therefore the other shall have advantage of it. Coke Just., contra; for a *retraxit* is only in the nature of an estoppel; and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in 21 H. 6. it is said, that there must be an actual release to one obligor to discharge the other. See March. Rep. 165. — Pas. 18. Car. Hannan v. Roll. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and in an action upon the case the matter was found specially; and Rolls argued, that the matter was not absolutely discharged, but only *sub modo*, viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient. — See Hob. Rep. 70. Parker v. Sir John Lawrence. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a *noli prosequi* against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him; but a *noli prosequi*, or nonsuit before judgment against one would discharge all.

(b) Bower v. Swadlin, 1 Atk. 294. See *Ex parte Slater*, 6 Ves. 146.

against the partners jointly, for the purpose of enabling him to recover payment from the joint estate, or from the separate estate of the other partner; a joint action having been commenced, the party released pleaded the release, to which the plaintiff replied, that he sued him only in order to recover against the other; and, on demurrer, the replication was held good. (a) A similar operation and effect is ascribable to a covenant not to sue one of several partners or joint debtors. Such a covenant does not extinguish the covenantor's right of action against the other debtors, although, if there had been a single debtor only, the covenant would have been tantamount to and would have operated as a release. (b) Thus, if a creditor covenant never to sue a debtor, this covenant may be pleaded by the debtor by way of release and in bar of the action, because the sum which the debtor may be compelled to pay would be the exact measure of damages for an infraction of the covenant, and consequently to admit a right of action would be a mere circuity (c); but if two be bound jointly and severally, and the creditor covenant with one of them not to sue him, it has been held that it shall not operate as a release, but shall be a covenant only; for a covenant is not a release in its nature, but only by construction, to avoid circuity of action; and where a creditor covenants not to sue one only of his debtors, he has still a remedy against the other, and therefore the objection of circuity cannot apply. (d) In a late case (e), where a creditor joined in a deed of composition with the other creditors of one of two obligors by a joint and several bond, the Court of King's Bench held that the other obligor could not avail himself of this as a release. The case of *Lacy v. Kynaston* being

(a) *Solly v. Forbes*, 4 B. Moore, 448. S. C. 2 Brod. & Bing. 38. In what cases the general words of a release are restrained by a particular recital or purpose, see *Morris v. Wilford*, 2 Show. 47. 2 Roll. Abr. 409. *Payler v. Homersham*, 4 Mau. & Selw. 423. *Twopenny v. Young*, 3 B. & C. 208.

(b) *Per Gibbs*, Ch. *J. Hutton v. Eyre*, 1 Marsh. 608. And see *dict.* of *Holroyd J.* in *Thomas v. Courtney*, 1 B. & A. 8.

(c) *Smith v. Mapleback*, 1 T. R. 446. Cro. Eliz. 623. In those cases where a covenant not to sue shall be construed to inure as a release to avoid circuity of action, the covenant not to sue must be a perpetual covenant, that is, a covenant not to sue at all; for a mere covenant not to sue within a particular time will not have this effect. *Deux v. Jefferyes*, Cro. Eliz. 352. S. C. 1 Rol. Abr. 939. *Ayliff v. Scromshire*, 1 Show. 46. S. C. Salk. 573.

(d) *Fitzgerald v. Trant*, 11 Mod. 254. *Lacy v. Kynaston*, 1 Ld. Raym. 690. S. C. 12 Mod. 551. 2 Salk. 575. Holt's Rep. 178.

(e) *Deau v. Newhall*, 3 T. R. 168.



cited, Lord *Kenyon* said, that, to be sure, it removed all difficulty on the subject, and was a direct authority in favour of the plaintiff; he had only been doubting in his own mind on the strict law of the case, for that the honesty and justice of it were with the plaintiff could not be doubted; and even if the defendant had succeeded at law, a court of equity would have given the plaintiff full relief. Indeed, where several are liable, and the creditor covenants with one of them only not to sue him, it seems difficult to imagine how it could have been presumed, that the intention of the person covenanting was to produce a collateral effect with respect to the others, when a distinct and reasonable effect might be produced, by giving the party, claiming the benefit of the covenant, redress for any injury which he might personally sustain from the infraction of it. The creditor in these cases must, for the sake of conformity, join all the partners or debtors in an action to recover his debt, since if all are not sued, it will be good ground for a plea in abatement; and the covenantee cannot plead the covenant not to sue himself in bar; but if the judgment be enforced against him, or he sustain any other damage, he must have recourse to his remedy against the creditor on his covenant. (a) Partners may also plead a tender of the sum due in bar of the action brought against them: but if to such a plea the plaintiff reply that he subsequently demanded the sum tendered, and that the defendants refused payment of it, the replication will be supported by evidence of a demand from one of the partners and a refusal by him to pay, because a refusal by one is equivalent to a refusal by both. (b) We have stated that partners may likewise avail themselves of any thing which goes in reduction of the demand made against them. This right, however, is not unlimited and undefined, but is regulated by those principles which govern the law of set-off in ordinary cases. Therefore, a separate debt due to an individual partner cannot be set against a joint demand upon the firm (c), unless there be an express agreement between the parties renouncing the general law, and stipulating that in such case a set-off shall be allowed. (d) But a debt on a joint and several bond may be set

(a) *Dowse v. Jefferies*, And. 307. pl. 316. S. C. Cro. Eliz. 352. *Turner v. Davies*, 2 Wms. Saund. 150, n. 2.

(b) *Peirse v. Bowles*, 1 Stark. N. P. C. 323. A tender to one partner is a good tender to all, and ought to be so pleaded. *Douglas v. Patrick*, 3 T. R. 683.

(c) 2 Geo. 2. c. 22. s. 13.

(d) *Kinnerley v. Hossack*, 2 Taunt. 170.

off by the obligee in an action brought against him by the obligor who executed. (a) And where a firm is, by death, reduced to a single member, the joint debts due to the firm become separate debts belonging to the survivor; and therefore, in an action for a debt due from him in his individual capacity, he may set against it a partnership debt due to himself as surviving partner. (b)

In actions against partners, as in all other cases, the contract declared upon must be proved, and it must be shown to have been a joint contract entered into by all those who are sued. For, in such an action, unlike one that is founded on a tort, it is not sufficient to establish a demand against a single defendant. There cannot be a severance; the contract as it is alleged must be established, both in its terms, and as it affects all the defendants, who are charged and called upon to fulfil it. If the plaintiff fail to substantiate it in part, by an inability to implicate and connect all the defendants with the contract he has stated to have been made by them, he fails *in toto*, and must institute a new action against those whom he can implicate. These observations naturally lead us to inquire, what proof it is requisite that a plaintiff should adduce in an action which arises, not out of a contract expressly made with all the defendants, but out of the fact of their partnership, to establish that the defendants are legally invested with the characters ascribed to them; we will afterwards consider the effect of an admission made by one partner, as it regards the joint interest of all, whether made by a partner who is, or is not, a party to the particular suit in which it is offered as evidence, or whether made pending the partnership, or after its dissolution; and then we will point out the instances in which a partner cannot, and those in which he may be admitted a witness in an action, either for or against his copartners. Where an action is brought against several upon a contract on which they are liable as partners, the evidence usually given to establish the partnership consists in showing that they have acted as partners in the particular business. In such a case the plaintiff is not bound down to the same strictness of proof which is required from partners when they appear as plaintiffs. There no reason exists

(a) *Fletcher v. Dyche*, 2 T. R. 32. See also *Elliot v. Davis*, 2 Bos. & Pul. 338.

(b) *Slipper v. Stidstone*, 5 T. R. 493. S. C. 1 Esp. N. P. C. 47. See also *French v. Andrade*, 6 T. R. 582.

for relaxing the rules of evidence ; for, by the very act of suing jointly, they assume that they have a joint title to sue, and they are necessarily cognisant of all the means by which the fact is capable of being proved : but where partners are sued as defendants, the plaintiff may not be able to ascertain the real connection between them, it is sufficient for him to show that they have acted as partners, and that, by their habit and course of dealing, conduct, and declarations, they have induced those with whom they have dealt to consider them to be partners. (a) Thus, in an action upon an agreement for letting premises, signed in the names of a partnership, it has been held, that proof of the defendants being in partnership under that firm, and both acting in it, was sufficient to bind both, though it was not shown, from the absence of the attesting witness, in whose hand-writing the agreement was signed. (b) And evidence that they have acted as partners is admissible, although the partnership may have been constituted by deed. (c) So, a witness called to prove the fact of the defendants having so acted may properly be asked, whether the one defendant has interfered in the business of the other, without the question being open to the objection of leading. (d) And to prove that the defendants are partners, it has been held that a verdict on an issue, directed by a court of equity, on a bill filed by one of them against the other, for the purpose of trying, and which established the fact of a partnership, is conclusive evidence of its existence ; because, although the plaintiff was no party to the suit out of which the issue arose, yet both the defendants having been parties in that suit, the record, as regarded them, could not properly be deemed a matter *inter alios acta*, since it was competent to either, by any evidence, to rebut the idea of a partnership. (e) So the fact of partnership may be proved by any acts or declarations of the defendants themselves, which indicate or acknowledge its existence. Therefore, if the de-

(a) 3 Stark. on Evid. 1070. But to charge a dormant partner, distinct evidence must be given that he has such an interest as to raise a liability, or that he was engaged in the particular transaction which is the subject of the action. *Gibbons v. Wilcox*, 2 Stark. 43.

(b) *Evans v. Curtis*, 2 C. & P. 206.

(c) *Alderson v. Clay*, 1 Stark. N. P. C. 406.

(d) *Nicholls v. Dowding*, *Ibid.* 81.

(e) *Whateley v. Menheim*, 2 Esp. N. P. C. 608. And see *Lowfield v. Bencroft*, Bull, N. P. 40. 2 New Rep. 371.



defendants, when sued as partners, produce a release, executed by all of them, in order to render a witness competent in the cause, such instrument is to be considered as in evidence for all purposes whatsoever, and is alone sufficient to establish the fact of a partnership. (a) And the declaration or admission of each individual member of a firm, that he is a partner, is conclusive evidence to charge himself in that character. Thus, if a person has represented himself to be a partner, and has been trusted as such, he is bound by that representation, and it is no defence for him to show that he was not, in fact, a partner (b); but if a particular transaction only be under discussion, and one person acknowledge himself to be the partner of another in it, he will not be bound by a contract unconnected with the particular object. (c) So, where a bill of exchange, drawn upon a firm, is accepted by an individual member in the joint name, the fact of the acceptance is evidence to charge the acceptor as a partner. (d) In like manner, an entry made according to the statute, at the Excise Office, by one partner, in the names of himself and co-partners, as dealers in beer, is *primâ facie* evidence of partnership against the party making it. (e) And in a late case, where it appeared that all the defendants, excepting one, had been outlawed, a letter written by that one, admitting his partnership with the co-defendants, was received as evidence of the partnership; for, as Lord *Ellenborough* observed, the record in that action would not be sufficient evidence in any future action that might be brought by the then defendant against the co-defendants for contribution, to prove that they were parties to the promise, and it would be incumbent on him to prove the fact by ulterior evidence. (g) And the acts and admissions of a party, made

(a) *Gibbons v. Wilcox*, 2 Stark. N. P. C. 43. Where a person, for the purpose of counteracting a report that he was in partnership with another, subscribed a notice of dissolution with a view to its insertion in the *Gazette*, Lord *Eldon* considered it as *primâ facie* evidence of the existence of the partnership, but directed an issue to try the fact. *Ex parte Matthews*, 3 Ves. & Bea. 123.

(b) *De Berkomp v. Smith*, 1 Esp. N. P. C. 29. And see *Ex parte Matthews*, 3 Ves. & Bea. 125. *Parker v. Barker*, 1 Brod. & Bing. 9. S. C. 3 B. Moore, 226. *Biddle v. Levy*, 1 Stark. N. P. C. 20.

(c) *De Berkomp v. Smith*, *supra*. (d) *Spencer v. Billing*, 3 Campb. 312.

(e) *Ellis v. Watson*, 2 Stark. N. P. C. 453, 478. In proceedings by the crown, the entry would be conclusive. *Id. ibid.*

(g) *Sangster v. Mazarredo*, 1 Stark. N. P. C. 161.

subsequently to a contract, may be used as evidence to show that he was a partner at the time of the contract; but if it be clear that he was not then a partner, no subsequent admission will render him liable in point of law. Therefore, one, who has been admitted into the firm, is not responsible for goods previously sold and delivered, notwithstanding he acknowledge his liability, and accept a bill for the amount; although, in an action on the bill, he would, of course, be liable, by virtue of that contract. (a) But the act or declaration of one partner is not evidence to prove the partnership against the other members of the firm. Thus, where a bill drawn upon a partnership firm is accepted by one partner in the joint name, the acceptance is not evidence of the partnership except against the acceptor. (b) So, an affidavit, for the registry of a ship, made by A, stating that A and B are the owners, is not evidence of the fact against B. (c) And where the question is, whether A, who resides in *England*, is partner with B, who resides in *Spain*, it is no evidence of the fact to show that B has long traded at *S.* in *Spain*, under the firm of A and B, and that A for a long time resided there, and that there was no other person there of that name. (d) And as the act or admission of one partner is insufficient to establish the fact of partnership against the others, it follows that any act by third persons, which affects to treat them as joint owners, is no evidence of the fact of joint ownership, unless the particular act be shown to have been recognised by them. Thus, to charge two persons as joint purchasers of a cart, an entry of such cart in the tax-gatherer's book, as the property of both, is not evidence, without showing that the parties authorised or adopted the entry. (e) Upon the same principle, an entry in books kept in the office for licensing stagecoaches, is not any proof that the persons named in the license are owners of a coach. (g) But, notwithstanding an admission of the partnership, made by one of several partners, will not establish it against the others, yet, if the

(a) *Saville v. Robertson*, 4 T. R. 720.

(b) *Spencer v. Billing*, 3 Campb. 312. 2 Phill. on Evid. 23.

(c) *Tinkler v. Walpole*, 14 East, 226. *M'Iver v. Humble*, 16 East, 169. *Flower v. Young*, 3 Campb. 240. *Smith v. Fuge* 3 Campb. 456. *Ditchburn v. Spracklin*, 5 Esp. N. P. C. 31.

(d) *Burgue v. Firmin De Tastet*, 3 Stark. N. P. C. 53.

(e) *Weaver v. Prentice*, 1 Esp. N. P. C. 369.

(g) *Strother v. Willan*, 4 Campb. 24.

fact that several are partners be proved by other means, the act or declaration of one, relating to the subject matter of the partnership, will bind all: for where partners or others possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject matter, is evidence against the rest. (a) Therefore in an action of covenant against two, the affidavit of one of them may be given in evidence as the acknowledgment of both. (b) And in an action against two, as drawers of a bill, it is sufficient to show that two persons, bearing the surnames of the defendants are in partnership, and that one of the partners acknowledged that the bill was drawn by them, without proving that they bear the Christian names assigned to them on the record. (c) So, an admission by one partner of a debt, and that it has not been paid, is evidence against all to take the case out of the statute of limitations. (d) And in a joint action against the joint makers of a promissory note, an acknowledgment by one of them within six years, will revive the debt against the other, who signed the note only as a surety. (e) So, although a *nolle prosequi* be entered as to one defendant, who pleads his bankruptcy, an admission made by him before he obtained his certificate has been ruled to be evidence against the other defendants. (g)

(a) *Per Le Blanc J.*, *Rex v. The Inhabitants of Hardwicke*, 11 East, 589. *Nicholls v. Dowding*, 1 Stark. N. P. C. 81. But where the same persons are partners, and also part-owners of a vessel, the admission of one as to a subject of copartnership, but not of copartnership, is not binding upon the others. *Jaggers v. Binning*, 1 Stark. N. P. C. 64.

(b) *Vicary's case*, Bac. Abr. tit. Evidence, 623. S. C. Gilb. Evid. 51.

(c) *Hodenpyl v. Vingerhoed*, *cor. Abbot J.* Chitty on Bills, 489. The rule, it seems, is different as to plaintiffs. *Acerro v. Petroni*, 1 Stark. N. P. C. 100; but see *Jowett v. Charnock*, 6 Mau. & Selw. 45. Com. Dig. Abatement, E. 18, 19. *Boughton v. Frere*, 3 Campb. 29.

(d) *Per Lord Kenyon*, *Perry v. Jackson*, 4 T. R. 516. *Thwaites v. Richardson*, Peake's N. P. C. 16.

(e) *Perham v. Raynal*, 2 Bingh. 306.

(g) *Grant v. Jackson*, Peake's N. P. C. 203. On the ground of its being a rule in equity not to receive the answer of one party against another, (see *Wych v. Meal*, 3 P. Wms. 310. 12 Ves. 361.) it has been held, that in an action against a firm, on a bill of exchange accepted by one partner in the joint name, the admissions of the acceptor in his answer to a bill filed in equity against him are not evidence against the rest. *Rooth v. Quin*, 7 Price, 193. And see *Perham v. Raynal*, 2 Bingh. 306. *Petherick v. Turner*, cited 1 Taunt. 104. *Grant v. Jackson*, Peake's N. P. C. 203. *contra*.



And the general rule, allowing the acts or declarations of one partner to be evidence against the others, has been extended so far as to admit the acts or declarations of one partner to be evidence against his copartners concerning joint contracts and their joint interest, although the partner, whose acts or declarations are given in evidence, is not a party to the suit. This extension of the rule does not encroach upon the principle established in the law of evidence, that the declarations of a party are not admissible where he is living, and can be called as a witness to substantiate upon oath the fact to which his declarations relate; for where the declarations are made by one who can be identified with him against whom they are offered, an exception has been engrafted upon that principle: such declarations are receivable, and the circumstance of the party making them being alive at the time of the trial, is no objection to their reception. (a) Thus, in an action against one partner for money paid to his use, the admission of the debt by another partner is evidence against the defendant. (b) So, an acknowledgment by one of several makers of a joint and several promissory note will take the case out of the statute of limitations, as against any one of the other makers in a separate action on the note against him. (c) Even the payment of a dividend by the assignees of one of the makers of such a note, within six years before the commencement of the action against the other maker, has been held a sufficient answer to a plea of the statute of limitations by that other. (d) So, a payment of interest by A on the joint and several note of A and B is in legal effect an admission by both that the note is unsatisfied, and operates as a new promise by all and each of the parties to pay according to the nature of the instrument, and that though B was a mere surety, and the payment was made without his

(a) *Barough v. White*, 4 B. & C. 328.

(b) *Thwaites v. Richardson*, Peake's N. P. C. 16.

(c) *Whitcomb v. Whiting*, Dougl. 629. 652. *Perham v. Raynal*, 2 Bingh. 306. By the late act of parliament, 9 Geo. 4. c. 14. s. 1., which renders a written memorandum necessary to the validity of any engagement or promise to take a case out of the operation of the statute of limitations, it is enacted, that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the 21 Jac. 1. c. 16. (Statute of Limitations) so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever.

(d) *Jackson v. Fairbank*, 2 H. Bl. 540. See *Ex parte Dewdney*, 15 Ves. 496.

knowledge. (a) But where one of two partners, who were the joint drawers of a bill of exchange became bankrupt, and, under his commission, the indorsees proved a debt (beyond the amount of the bill) for goods sold, and they exhibited the bill as a security they then held for their debt, and afterwards received a dividend; it was determined in an action by the indorsees against the solvent partner, that the statute of limitations was a good defence, although a dividend had been paid within six years, inasmuch as the proof being for goods sold, the payment of the dividend did not amount to an actual or virtual acknowledgment that there was any money due on the bill. (b) So, where A and B made a joint and several promissory note, and ten years after A's death B paid interest on the note; in an action brought upon the note against the executors of A, it was held that, the joint contract having determined by the death of A, the payment of interest by B did not take the case out of the statute of limitations, so as to make A's executors liable. (c) And in all cases in which it is endeavoured, by means of the acknowledgment of one partner, to avoid the operation of the statute of limitations in favour of the other, it is necessary that the acknowledgment should be clear and explicit; therefore, in an action on a joint promissory note, it is not sufficient to destroy the effect of a plea of that statute, to show a payment by a joint maker to the payee within six years, so as to throw upon the defendants the obligation of proving that the payment was not made on account of the note. (d) The principle of the general rule also extends to an admission made by one partner, after a dissolution of the copartnership; for, even in such a case,

(a) *Burleigh v. Stott*, 2 Mann. & Ryl. 93. S. C. 8 B. & C. 36. In the former report of this case, *Holroyd J.* is reported to have said, "There can be no doubt that, regarding the note as joint only, the payment by one took the note out of the operation of the statute as regards both the makers. I think in justice and sense, the same result ought to follow, regarding the note as both joint and separate. The debt was in reality originally a joint debt, and though each debtor became separately, he was still jointly, liable, and a payment by one released *pro tanto* both the joint and separate liability of each. The one receives the benefit of a payment by the other, the same whether the liability be joint only, or both joint and separate: in fairness, therefore, he ought to incur the same responsibility in both cases. In the case of a joint and several bond, a release by the obligee to one obligor would clearly destroy the joint and several obligation."

(b) *Brandram v. Wharton*, 1 B. & A. 463.

(c) *Atkins v. Tredgold*, 2 B. & C. 23.

(d) *Holme v. Green*, 1 Stark. N. P. C. 488.

the admission will conclude his copartners, if it relate to a transaction which occurred pending the partnership. (a) Therefore, where the creditor of a partnership, in discharge of a demand against himself, assigned to a third person the debt owing to him by the firm, it was determined that a verbal promise, by one of the partners, to pay such debt to the assignee, was not within the statute of frauds; for it was not an undertaking for the debt of another, the old debt being extinguished and a new one created: and that the promise bound not only the party who made it, but the whole partnership, even though some of the members of the firm had retired before the promise was given, provided the debt to which it had reference arose out of joint contracts, entered into whilst they continued in the partnership. (b) And it has been reported to have been the opinion of Lord *Kenyon*, that a declaration, after the dissolution of a firm, by one of the members, as to the different persons of whom the firm was composed, is evidence against all the members to prove the partnership. (c) But the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation (d); neither is a declaration made by one of two partners, during an existing copartnership, evidence to bind his partner as to a transaction which took place previous to the partnership, unless a joint responsibility be proved as a foundation for such evidence. (e) Notice to one of several partners is a sufficient notice to all. When therefore a bill has been drawn by a firm upon one of the partners, and by him accepted and dishonoured, it is unnecessary to give notice of such dishonour to the firm; for this must necessarily be known to one of them, and the knowledge of one is considered as the knowledge of all. (g) And in such a case, proof of the acceptance of the bill by the drawee is evidence, in an action against all the drawers, that the bill was regularly drawn. (h) Where the joint liability results not from

(a) *Wood v. Braddick*, 1 Taunt. 104.

(b) *Lacy v. McNeile*, 4 Dowl. & Ryl. 13.

(c) *Evans v. Drummond*, 4 Esp. N. P. C. 89. It is at least doubtful whether such a declaration can be evidence of the fact of partnership; for, if it were made during the partnership, it would be unavailing, except against the partner from whom it proceeded. See *ante*, p. 193.

(d) *Wood v. Braddick*, *supra*.

(e) *Catt v. Howard*, 2 Stark. on Evid. 45. S. C. 3 Stark. N. P. C. 3.

(g) *Porthouse v. Parker*, 1 Campb. 82.

(h) *Id. ibid.*



a contract expressly made with all the defendants, but from the fact of their partnership, it may be removed by proving a notice to the plaintiff that the firm would not be answerable on contracts made by any single partner in the joint name. (a) So, where the fact warrants it, it is competent to the defendants to prove a dissolution of the copartnership previous to the contract; this, however, will not be in itself sufficient where the defendants have openly acted as partners, unless notice to the plaintiff of the dissolution be also proved. It is sufficient, if the plaintiff, in the first instance, prove a partnership at a time anterior to the contract; when that is once established, a continuance of the partnership is to be presumed, until a dissolution be proved; and proof of a dissolution will still be insufficient, unless reasonable proof be given of notice of the fact to the plaintiff; for although the partnership may, in fact, have been dissolved, yet if the parties do not announce it, they, by their silence, induce strangers to continue to trust to the joint credit of the firm. (b) And where notice of the dissolution is proved, the plaintiff may rebut it by evidence of the subsequent conduct and declarations of the defendants, tending to induce the world to suppose that the partnership still subsisted; as by proof that they subsequently interfered in the management of the business, or allowed their names to be used, or in any way authorised the parties acting in the concern to make use of their names and credit. (c) A mere statement in conversation by one partner that he has ceased to be a partner, is not admissible evidence on his part to prove a notice of dissolution. (d)

A party to the suit on record cannot, generally, be a witness at the trial for himself or for a joint suitor, against the adverse party, on account of the immediate and direct interest which he has in the event, either from having a certain benefit or loss, or from being liable to costs. (e) But there seems to be no objection to the competency of persons, who are parties to a suit in a corporate capacity, and consequently not individually liable to costs,

(a) *Lord Galway v. Matthew*, 10 East, 264. *Vice v. Fleming*, 1 Youn. & Jerv. 226.  
(b) 3 Stark. on Evid. 1078.

(c) *Newsome v. Coles*, 2 Campb. 617. And see *Williams v. Keats*, 2 Stark. N. P. C. 290. *Dolman v. Orchard*, 2 C. & P. 104. *Stables v. Eley*, 1 C. & P. 614. Where a seceding partner's name is continued in the firm by express agreement, he will be liable to persons acquainted with the fact of the dissolution under those circumstances, inasmuch as such an agreement implies an undertaking to continue responsible for the engagements of the firm. *Brown v. Leonard*, 2 Chitt. 121.

(d) *Dolman v. Orchard*, *supra*.

(e) 1 Phill. on Evid. 71.

and who are free from all interest in the question. Thus, in an action against the governors of the *Foundling Hospital* for the amount of work done by the plaintiff, *Lord Kenyon* admitted several of the governors to prove the badness and insufficiency of the work. (a) So, where, in an action against several, one pleads his bankruptcy, and the plaintiff enters a *nolle prosequi* as to him, he is thereby rendered a competent witness for the other defendants. (b) But if the plaintiff, instead of entering a *nolle prosequi*, take issue on the plea of bankruptcy, the bankrupt cannot be admitted to give evidence for the rest, though he may have received his certificate; for, in case of a verdict for the plaintiff he is liable to the costs of the action. (c) Nor, on proof of his certificate, is he entitled to a verdict during the progress of the cause, in order that he may be introduced as a witness for his co-defendants. (d) So, in an action on a joint contract against two defendants, where one let judgment go by default, *Lord Kenyon* refused to admit him as a witness for the other defendant, to negative the contract; for, if negatived as to one it fails as to the other, and the plaintiff could not make use of the judgment by default against him. (e) Nor is a defendant so situated a competent witness for the plaintiff to prove that the other defendant was a party to the contract; for if the plaintiff should succeed, he would be entitled to contribution from the co-defendant, and if the plaintiff should fail, he himself would be liable to the whole of the demand. (g) And a release from the plaintiff would not render him competent; for one objection to his admissibility is, that his evidence might tend to inculcate his co-defendant, and therefore, without his consent, his testimony cannot be received. (h) And a person who is shown to be a copartner with the defendant in the subject of the

(a) *Weller v. The Governors of Foundling Hospital*, Peake's N. P. C. 153. *Barret v. Gore*, 3 Atk. 401.; but see *Whitmore v. Wilks*, 1 M. & Malk. N. P. C. 214. and 3 C. & P. 364.

(b) *M'Iver v. Humble*, 16 East, 171. S. P. ruled at Lancaster by *Le Blanc J. ex relatione Park J.* 1 B. Moore, 339. *Moody v. King*, 2 B. & C. 558.

(c) *Raven v. Dunning*, 3 Esp. N. P. C. 25. S. P. *Currie v. Child*, 3 Campb. 283.

(d) *Emmett v. Butler*, 7 Taunt. 599. S. C. 1 B. Moore, 332.

(e) *Brown v. Fox*, Ex. Sum. Ass. 1789, 1 Phill. on Evid. 78.

(g) *Brown v. Brown*, 4 Taunt. 752.

(h) *Mant v. Mainwaring*, 2 B. Moore, 9. S. C. 8 Taunt. 139. In an action for a tort, it has been ruled, that one defendant who suffers judgment by default is a competent witness to prove that a co-defendant who has pleaded is not chargeable. *Ward v. Haydon*, 2 Esp. N. P. C. 552. *Chapman v. Graves*, 2 Campb. 334. n. See *Rex v. Lafone*, 5 Esp. N. P. C. 155.

action is, in general, incompetent to be a witness for him; because in the event of a verdict for the plaintiff, he would be liable to contribute not only his proportion of the sum recovered, but also his share of the costs: and he will not be admissible, even although the tendency of his evidence be to charge himself with the whole debt, or although the defendant offer to release him. (a) Thus, in an action against a part-owner for painting the ship, to which the defendant pleaded in abatement that there were other part-owners not joined, and the plaintiff replied that the defendant had undertaken solely to pay, it was held that the defendant could not call the master, who was also a part-owner, to prove that he ordered the work to be done. (b) So, in an action of assumpsit for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and to one J. S., who were partners in trade, *Lord Kenyon* held that J. S., could not be a witness for the defendant to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase, except as his servant; for, said his Lordship, by discharging the defendant he benefits himself, as he will be liable to pay a share of the costs to be recovered by the plaintiff. (c) And in an action against A for the price of goods sold, B is not a competent witness on the part of the defendant, to prove that the goods had been sold to A and B jointly, and that they had been paid for by remitting a debt due from the vendor to the firm of A and B. (d) However, to raise the objection of incompetency, it must be shown that the witness is a partner; it is not sufficient merely to *suggest* it. Thus, in action for goods sold and delivered, a witness is competent to prove that the goods were supplied upon his credit, and for his use, although it be *suggested* that he is a partner with the defendant. (e) But although, during the subsistence of a partnership, one partner is generally incompetent to defeat the claim of the plaintiff on account of the direct interest he has in the event of the cause, yet if the interest of the witness incline him to each of the parties, so as upon the whole to make him indifferent, he will be competent to give evidence. Thus, one of the joint makers of a promissory note is a competent witness, on the part of the plaintiff, to prove

(a) *Simons v. Smith*, 1 Ryan & Mood. 29. *Cheyne v. Koops*, 4 Esp. N. P. C. 112. *Young v. Bairner*, 1 Esp. N. P. C. 103. *cont.*

(b) *Young v. Bairner*, *supra*. (c) *Goodacre v. Breame*, Peake's N. P. C. 174.

(d) *Evans v. Yeatherd*, 2 Bingh. 133. (e) *Birt v. Hood*, 1 Esp. N. P. C. 20.



the signature of the defendant, the other joint maker (a); for if the plaintiff should recover against the defendant, the witness would be liable to the defendant for contribution; if, on the other hand, the plaintiff fail, he may resort to the witness for the whole, and then the witness would be entitled to contribution from the defendant; so that, in either view of the case, the witness is indifferent in point of interest. (b) So, in an action against one partner, his copartner is admissible as a witness on the part of the plaintiff, to prove the defendant's liability. Thus, in assumpsit for goods sold and delivered, and the general issue pleaded, a witness called by the plaintiff admitted on the *voir dire*, that he was jointly liable; and on motion to enter a nonsuit on account of his incompetency, it was held that his joint liability did not render him incompetent. (c) And in an action brought to charge A. as a partner in a trading company, a witness, who by other evidence than his own, appeared to be a shareholder in the Company, was held to be competent to prove that A was a partner. (d) So where one partner drew a bill in the name of the partnership firm, and gave it in payment to a separate creditor in discharge of his own debt, the Court of King's Bench held, that in an action by such creditor against the acceptor, either of the partners might be called, on the part of the defendant, to prove that the partner who drew the bill had no authority to draw it in the name of the firm; and that the bankruptcy of the partners would not vary the question as to the competency of the witness. (e) And in a late case, which was an action of assumpsit for the non-delivery of goods, and for money had and received, and the defendant pleaded in abatement that the promises were made jointly with A and B, and not by the defendant alone, it was determined that A was a competent witness for the plaintiff, to prove that the defendant was not authorised or employed by the partners to make the contract, and that he received the money to his own use; for, although the plaintiff should succeed, the

(a) *York v. Blott*, 5 Mau. & Selw. 71.

(b) 1 Phill. on Evid. 68.

(c) *Blackett v. Weir*, 5 B. & C. 385; and see *Fawcett v. Wrathall*, 2 C. & P. 305.

(d) *Hall v. Curzon*, 9 B. & C. 646. In *Luckett v. Graham*, 1 Stra. 35. which was an action against one of three obligors, a co-obligor was allowed to be a witness to prove the execution of the bond by the defendant.

(e) *Ridley v. Taylor*, 13 East, 175.

defendant would not on that account be precluded from suing the other partners for contribution; the record in this action would not operate as an estoppel against him on that occasion, because there is no mutuality out of which the estoppel can arise: the record could only be used as a medium of proof, to show that this defendant had paid in the action a certain sum (*a*), and in this point of view the verdict in favour of the plaintiff must be considered rather as prejudicial to the witness. (*b*) So, A would, under such circumstances, have been a competent witness for the defendant to negative his several liability; and if, on being called, he should have denied the partnership, the defendant would still have been at liberty to have proved its existence by other witnesses; for, although a party will not be permitted to produce general evidence to discredit his own witness, yet he may show by other testimony, that the witness was mistaken as to the fact which he was called to establish. (*c*) Where there has been a dissolution of the partnership, one partner is a competent witness for the other in any transaction which has occurred since their separation. Therefore where, two days after a dissolution, a bill was drawn in the names of the *quondam* partners, which was accepted and paid by a third person without consideration; in an action by the acceptor against the partners to recover the money so paid, to which one of them pleaded his bankruptcy and certificate, and the plaintiff entered a *nolle prosequi* as to him, it was held that he was a competent witness for the other defendant, to prove that the bill was accepted for his own individual accommodation, and not jointly for him and his former partner. (*d*) It has been ruled, that a partner who has obtained his certificate under a joint commission is not a competent witness to prove either of the requisites to support the commission. (*e*)

(*a*) See *Evans v. Yeatherd*, 2 Bingham 133.

(*b*) *Hudson v. Robinson*, 4 Mau. & Selw. 475. *S. P. Cossham v. Goldney*, 2 Stark. N. P. C. 414.

(*c*) *Ewer v. Ambrose*, 3 B. & C. 746. Where a witness, called by the defendant to prove a partnership, disproves it, the answer of the witness to a bill in chancery, in which he swore that he was a partner, is not admissible in evidence, on the part of the defendant, to prove substantively the partnership; and it is doubtful whether it is receivable at all, because the only effect of it seems to be that of impeaching his credit. *Id. ibid.*

(*d*) *Moody v. King*, 2 B. & C. 558.

(*e*) *Flower v. Herbert*, 2 H. Bl. 279. note (*a*).

Having pursued our inquiries relative to actions against partners through their various stages, so far at least as falls within the compass of the present treatise, it now remains to be ascertained in what manner a judgment obtained against them in a civil action can be enforced. The action being joint, the judgment, of course, ensues the nature of the action, and is joint likewise. In executing such a judgment, no difficulty arises; the whole of the personal effects of the partnership, or a sufficient quantity thereof to satisfy the sum recovered, may be seized and sold under a writ of *fiery facias* founded upon the judgment, in the same manner as if they were the sole property of one defendant, against whom a separate judgment had been obtained. Besides the right possessed by the judgment creditor against the joint property, he may also seize the separate effects of each or any of the individual partners. (a) He may likewise extend the real estates of which the partners may be seised, or he may sue out a joint writ of *capias ad satisfaciendum*, and execute it upon the persons of all or any of the partners. But where a judgment is obtained against an individual partner who has an interest in the capital (b), for his separate debt, and the creditor, after taking out execution, seeks to enforce it against the joint property (for he has an election, either to take the separate estate of his debtor, or his debtor's share of the joint estate), it seems to be a very difficult thing to determine with certainty in what manner it is to be done. It is clear the separate creditor has only a right to such interest in the joint property, as upon a fair adjustment of accounts could be claimed by the debtor himself; and although it may be represented, that the world cannot know what is the distinct interest of each, and therefore that it is better his apparent should be considered as forming his actual interest, yet courts of equity (and in awarding execution courts of law have professed to follow courts of equity) have long held otherwise, considering it not to be equitable. The debtor may not be interested in an equal moiety; indeed, after the partnership accounts are taken, his apparent interest may, in reality, dwindle to nothing. It is obviously difficult, there-

(a) *Per Lord Eldon, Ex parte Ruffin*, 6 Ves. 119. *Bolton v. Puller*, 1 Bos. & Pul. 547.

(b) In *Ex parte Hamper*, 17 Ves. 404. Lord Eldon expressed his opinion to be, that where the interest of a dormant partner is confined to the profits, but does not extend to the capital, his separate creditor cannot issue execution against the effects of the partnership, even subject to an account.



fore, to maintain as equitable a proceeding at law which permits a creditor of one partner, without any attention to the rights of the partners themselves, to take one half of a chattel belonging to them, as if it were perfectly clear that the actual interest of each was in a moiety. (a) Courts of law, however, have repeatedly laid down (b), that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a court of equity ascertained previously what was to be sold. Indeed, it would be impossible for a court of law to ascertain what was the interest to be sold, and what were the equities depending upon the accounts of the partners for years. (c)

At law, the rule was, in one case, stated by Lord Ch. J. *Holt* to be, that where there is execution against one of two partners, the sheriff must seize all the goods; because the moieties are undivided: for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner. (d) The rule as thus laid down seems to have been adopted in two subsequent cases. (e) But in a still later case (g), the same learned *Chief Justice* qualified the rule, and held that, although, generally speaking, the partners have joint and undivided interests, yet that, to some purposes, their possession, as well as their interest, is several; and that, under an execution, only the moiety of the partner who is the defendant can be seized and sold, for the property of the other moiety is not affected by the judgment; and in a more recent case (h), where there had been judgment, a *fieri facias* against one of two partners, and all the partnership goods were seized in execution, upon an application to the King's Bench by the solvent partner, the court held, that the sheriff could not sell

(a) See *Dutton v. Morrison*, 17 Ves. 201.

(b) *Backhurst v. Clinkard*, 1 Show. 173. *Eddie v. Davidson*, Dougl. 650; and see *Scott v. Scholey*, 8 East, 467.

(c) *Per Lord Eldon* in *Waters v. Taylor*, 2 Ves. & Bea. 301. See also *In re Wait*, 1 Jac. & Walk. 608.

(d) *Heydon v. Heydon*, 1 Salk. 392.

(e) See *Pope v. Haman*, Comb. 217. *Marriott v. Shaw*, Com. Rep. 277.

(g) *Backhurst v. Clinkard*, 1 Show. 173.; and see the note subjoined to this case, from which it appears that the same point had been resolved the day before, and that Ch. J. *Polluxfen* agreed in opinion.

(h) *Jacky v. Butler*, 2 Lord Raym. 871.

more than a moiety. (a) In *Skipp v. Harwood* (b), according to Lord Mansfield's note (c), Lord Hardwicke entertained the same opinion; he thought that only the undivided share of the debtor could be taken, and that in the same manner as the debtor himself had it, and subject to the rights of the other partner; for, as an execution against one partner for his separate debt ought not to put the solvent partner in a worse condition, therefore he must have all proper allowances made him before the judgment creditor could have the share of his debtor applied in satisfaction of the judgment. Upon this footing it is, that courts of law now profess to act in awarding execution against the joint effects; if it were otherwise, the party claiming and deriving title under an execution would be in a better situation than the partner against whom the judgment was obtained, which would be wholly inconsistent with the acknowledged and declared principles of the law. (d) Conveniency and justice certainly require this mode of proceeding, as it enables the other partner to buy in the share sold, and thereby prevent the business from being broken up or disturbed: and the vendee, if a stranger, will only succeed to the share due to the defendant upon a balance being struck, thus preventing the defendant from being the means of carrying out of the partnership funds more than he is himself really entitled to. The creditor of any one partner may therefore take in execution that partner's interest in all the tangible property of the partnership (e); but the levy under the execution transfers no part of the joint property, it merely gives a right to an account, each partner having an interest, not in the whole, but in the surplus merely. (g) The joint property must be delivered from the joint debts; if the joint estate be insolvent, the separate creditor cannot reap the fruits of his judgment. (h) An account must likewise be taken between the partnership and

(a) See also *Barker v. Goodair*, 11 Ves. 78. *Hankey v. Garret*, 1 Ves. jun. 236. S. C. 3 Bro. C. C. 457.

(b) Reported 1 Ves. Jun. 239. by the name of *West v. Skipp*. S. C. 2 Swanst. 586.

(c) See *Fox v. Hanbury*, Cowp. 445.

(d) *Id. ibid.* In the late case of *Burton v. Green*, 3 C. & P. N. P. C. 308. it was considered difficult to say, what interest could be taken by the sheriff under an execution against one of several partners for his separate debt; but *semble* he will not become tenant in common with the other partners.

(e) *Chapman v. Koops*, 3 Bos. & Pul. 289. See also 17 Ves. 206.

(g) *Per Lord Eldon* in *Dutton v. Morrison*, 17 Ves. 201.; see also *Rex v. Sanderson*, 1 Wightw. 50.

(h) *Taylor v. Fields*, 4 Ves. 639. S. C. 15 Ves. 559. in note.

the individual partner; for until that be taken, his interest in the surplus of the joint effects cannot be ascertained. (a) But although courts of law assume to award execution on the equitable principles we have stated, their powers are inadequate to the accomplishment of their intention. A court of law has no authority to restrain an execution against partnership effects, or to direct an inquiry as to the *quantum* of interest of the partner who is sued. In one case, indeed (b), the Court of King's Bench suspended an execution, and directed the Master to take an account of the share of the partnership effects, to which the assignees of the other partner (he having become bankrupt) were entitled, and ordered the sheriff to pay a part of the money levied, equal to the amount of such share, to the assignees. But there no objection was made to the sale by the party applying, or to an account being taken by the Master by the party levying, though he denied the title of the bankrupt partner to any of the goods. (c) Where the plaintiff, in the execution, objects to such a reference, a court of law having no jurisdiction to direct a partnership account to be taken, cannot interfere, since, without the consent of all parties, it has no power to authorise its officers to inquire into such matters of account as are the proper subjects of investigation in a court of equity (d); unless, indeed, an improper use is made of the process of the court; for if it appear to have been resorted to for the purposes of oppression, it may afford ground for its interposition. (e) Neither will a court of law, upon the application of partnership creditors, give time to the sheriff to make his return to the writ of execution, so as to enable them to obtain an account in equity, whereby the specific interest of the debtor on the judgment would be ascertained. (g) The proper and safest line of conduct for the sheriff, in such a case, to pursue, is, to put some person in possession of the defendant's share as vendee, leaving him and the parties interested to contest the matter in a court of equity. (h) If the sheriff be

(a) *Id. ibid.* *Waters v. Taylor*, 2 Ves. & Bea. 301. *Barker v. Goodair*, 11 Ves. 78.

(b) *Eddie v. Davidson*, Dougl. 650.

(c) *Per Chambre J.*, *Chapman v. Koops*, 3 Bos. & Pul. 289.

(d) *Chapman v. Koops*, *supra*.

(e) *Id. ibid.*

(g) *Parker v. Pistor*, 3 Bos. & Pul. 288.; but see the case cited by *Best Serjt.*, arg.

(h) *Id. ibid.*



called upon to discharge his duty, he is bound to seize and sell whatever interest the individual partner may have in the joint property; if he do not possess any interest, or if, possessing an interest, it has been seized under a prior writ of execution, and therefore is in the custody of the law (a), the sheriff must return *nulla bona*. But the interest or share of the other partners not being affected by a writ of execution executed against the joint effects at the instance of a separate creditor of one partner, it follows, that if, after a levy made under that writ, writs of execution should likewise be issued against any of the other partners, the sheriff must seize their shares, and if, instead of doing so, he return *nulla bona*, such a return will be false, and he will be liable to an action for making it. (b)

But notwithstanding the rules by which a court of law is fettered and bound down render it incompetent to administer complete and substantial justice to all parties, yet in cases of execution courts of equity will interpose their aid, and finally adjust the rights of the parties. In adjudicating such questions the governing principle is, that the equity of the creditor is founded on the equity of the partner (c), and as the partnership property has been acquired by the contraction of partnership debts, it ought first to be applied in discharge of them, according to the maxim, *qui sentit commodum, sentire debet et onus*. The whole of this doctrine seems to arise out of the very principle upon which partnership is founded, namely, probable profit and the risk of loss, the advantages or disadvantages of which cannot, in common justice, be confined to one side only, but must be reciprocal throughout. The separate creditor of one partner having, therefore, no right against the partnership property beyond the separate interest of that partner, the solvent partners may file a bill in equity against him to take an account, as a means of ascertaining what interest the individual partner actually possesses in the joint stock, and until such account be taken, may obtain an injunction restraining proceedings under the writ. (d) And even after a sale by the sheriff, as his vendee becomes tenant in common with the solvent partners of the joint effects, the latter may exhibit a bill and compel him to assent to the ordinary

(a) 1 Show. 169.

(b) Id. *ibid*.

(c) Campbell v. Mullet, 2 Swanst. 570.

(d) Taylor v. Fields, 4 Ves. 396. S. C. 15 Ves. 559, in note.

equity attaching on partnership property, which is, that it is not to be divided until the joint debts, and the separate claims of the partners themselves, are paid and discharged. (a) In such a case, a court of equity, differing in this respect from a court of law, has no difficulty in settling and arranging the rights of the parties *secundum æquum et bonum*; and, considering the nature and effect of the contract of partnership to be, that the whole property is pledged to partnership purposes, and amongst and in preference to any other purpose, to the payment of the joint debts, and having the means of taking the complicated accounts of the partnership, it converts the joint stock into that state in which the property would be divisible as clear surplus. (b) It concedes to the judgment creditor only that *quantum* of interest which the individual partner himself could extract out of the concerns of the partnership after all the accounts of the partnership are taken, and the effects of the partnership are reduced into a dry mass of property, upon which no person except the partners themselves have any claim. (c) The party succeeding to the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but subject to an account between the partnership and the partner. If the whole property be due to the joint creditors, they have the preferable right to it; but if it be not exhausted in satisfying their demands, and the other partners have claims upon the remaining surplus, in consequence of having brought into the partnership or disbursed more than their proportion, they must be placed on an equality, by a reimbursement of their advance, before the judgment creditor, or the person claiming through the sheriff, can insist upon payment: for all that can, in such case, be delivered in equity, is the interest which the partner had in the same state and condition in which it was, and subject to the same claims as existed against it when the partner himself possessed it. (d)

On the subject of executions it remains to be observed, that the writ of execution must correspond with the judgment by

(a) *Per Lord Alvanley*, *Chapman v. Koops*, 3 Bos. & Pul. 289.

(b) *Dutton v. Morrison*, 17 Ves. 206. S. C. 1 Rose, B. C. 213; see also *Barker v. Goodair*, 11 Ves. 85.

(c) *Dutton v. Morrison*, *supra*.

(d) *Taylor v. Fields*, 4 Ves. 396. S. C. 15 Vesey, 559; see also *Young v. Keighly*, 15 Vesey, 557.

which it is warranted, and on which it depends. As, on a judgment against an individual, an execution cannot issue against him and another, so on a joint judgment against several, a separate execution against one cannot be sustained. (a) Even if some of the defendants have died since the judgment was recovered, the execution must still be taken out in the joint names of all those against whom it was obtained. (b) But when it is issued against all, it may be executed against all, or separately against each, since each is answerable for the whole debt, and not for any definite proportion of it. (c) And if it be enforced against an individual defendant, from whom actual satisfaction is obtained, such satisfaction operates as a discharge of the other defendants from the claim of the plaintiff. (d) The creditor is entitled only to payment, which, if made by one debtor, must necessarily liberate the other debtors from his demand, although, as between the debtors themselves, the consequent obligation arises, of contributing each his proportion towards the liquidation of the debt. (e) On the same principle it is, that if, after one of several joint debtors on a judgment has been taken in execution on a *capias ad satisfaciendum*, he escape, and the creditor, in an action against the sheriff founded on the escape, recover from him the debt and damages due on the judgment, the demand of the creditor is extinguished; because, as regards him, were the judgment not vacated, he would obtain a double satisfaction. (g) The law, therefore substantially transfers the remedy to the sheriff, who, by an action, founded on the recovery against himself, may obtain a complete indemnification against the damages he has been constrained to pay. But it is not alone in cases of an actual pecuniary satisfaction received by the creditor that the debtors on a joint judgment are absolved from their joint and several responsibility under it; the creditor himself may, by his own acts, produce a perfect exoneration of the debtors from liability, both separate and joint. For instance, if, after the person of a single joint debtor has been taken by virtue of a writ of execution issued against several, the creditor, on a compromise being effected, or for any other cause, consent to his liberation, he cannot afterwards retake him, or take any of the

(a) *Clarke v. Clement*, 6 T. R. 525. *Hob.* 59. *Hunt v. Pasman*, 4 M. & S. 329.

(b) *Lord Raym.* 244. *S. C.* 1 *Salk.* 319. *Tidd's Pract.* (7th ed.) 1155.

(c) *Abbot v. Smith*, 2 *Blackst. Rep.* 947. *Ex parte Ruffin*, 6 *Vesey*, 119.

(d) *Hob.* 59. *Com. Dig.* tit. *Execution* (H). (e) See *ante*, p. 79.

(g) *Hob.* 59.



co-debtors; the personal caption and subsequent voluntary discharge of one joint debtor, under final process, being so far considered as a legal satisfaction of the entire debt, as that it cannot be enforced against the other debtors. (a) And where a plaintiff obtained a verdict in trespass against two defendants, and both being arrested on a joint writ of *capias ad satisfaciendum* for the amount of the damages, one was afterwards discharged on giving a promissory note to the plaintiff, payable by instalments, it was held that this operated to discharge the other. (b) But although such is the legal consequence of a discharge of one of several joint debtors, when emanating from the act of the party or creditor, yet the same effect is not produced, where the liberation proceeds from, and is a consequence of the act or operation of the law. Therefore the discharge, under an insolvent debtors' act, of one of two defendants taken on a joint writ, does not operate as a discharge of the other defendant, since it is not with the actual consent of the creditor. (c) Nor are joint debtors exempted from their joint responsibility, if one of them being taken in execution escape, and the creditor, not exerting his legal remedy against the sheriff, does not obtain from him an equivalent in damages for the debt. (d) So, if one die whilst in execution under a joint judgment, the right of the creditor under the judgment survives against the others. (e) A caption of one defendant under a *capias ad satisfaciendum* is no actual satisfaction, so as to bar the plaintiff from taking out execution against other persons liable to the same debt or damages. (g) In an action against several defendants, a verdict was taken for the plaintiff for a certain amount of damages, subject to a point of law reserved for the opinion of the court; and in case that point should be determined in favour of the plaintiff,

(a) *Clarke v. Clement*, 6 T. R. 526. 5 Cro. Eliz. 73. Co. 586. See also *Tanner v. Hague*, 7 T. R. 420. *Blackburn v. Stupart*, 2 East, 243.

(b) *Ballam v. Price*, 2 B. Moore, 235. Where the obligee of a joint bond after an assignment of the estate of one of the obligors under a commission of bankruptcy, recovered judgment against the other, and took him in execution by a *capias ad satisfaciendum*, but consented to his discharge on payment of part of the debt; on petition to the Lord Chancellor he was allowed to come in as a creditor before the assignees for a moiety of the money remaining due on the bond, for as the execution against the one obligor was subsequent to the assignment of the bankrupt's estate, the obligee had already a vested interest in that estate. *Ex parte Smith*, 1 P. Wms. 237.

(c) *Nadin v. Battie*, 5 East, 147.

(d) *Cro. Eliz.* 479. 555. 573. 5 Co. 86. *Hob.* 59. (e) *Id.* *ibid.*

(g) *Hob.* 59.; and see *Brickwood v. Annis*, 5 Taunt. 614. S. C. 1 Marsh. 250.

then subject to the award of a barrister as to the amount of damages. The point of law being decided in favour of the plaintiff, the arbitrator declined proceeding in the reference, having been consulted by one of the parties in the cause. One of the defendants refused to name any other arbitrator; and, under these circumstances, the court ordered judgment and execution to issue against that defendant for the damages found by the jury unless he would consent to refer the damages to some other arbitrator. (a)

If the sheriff, under an execution against one of two partners, seize and sell the whole of the property, the solvent partner may, it seems, either consider the seizure and sale as a tort, and maintain an action of trover against him, or he may waive the tort and adopt the sale; in which case, he may proceed against the sheriff as for money had and received to his use. (b) But if, under such an execution, the sheriff neither seizes nor sells any part of the joint property, but falsely returns *nulla bona*, in an action against him for such return, the proper measure of damages seems to be *half* the value of the whole goods. (c)

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## SECTION II.

### *Equitable Remedies against Partners.*

CREDITORS, or persons contracting with a partnership firm, may likewise, where there is a defect of remedy at law, resort to a court of equity, and call in aid its interference. In many instances more effectual relief is administered in equity, than the forms and technicalities of the law will allow it to grant. The common law, for example, though it professes to adopt the *lex mercatoria*, has not adopted it throughout, in what relates to partnerships in trade. It holds, indeed, that although partners are in the nature of joint tenants, there shall be no survivorship between them in point of interest; yet, with regard to partnership contracts, it applies its own peculiar rule; and because they are

(a) Woolley v. Kelly, 1 B. & C. 68.

(b) Tidd's Pract. (7th ed.) 1024.

(c) Tyler v. Duke of Leeds, 2 Stark. N. P. C. 218.

in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors. By the general mercantile law, however, a partnership contract is several as well as joint; and courts of equity, adopting to its full extent that law for their guidance, have considered joint contracts of this description as standing upon a different footing from ordinary joint contracts, and have ascribed a several, as well as a joint operation to them. On the ground, therefore, that each partner is liable for a partnership debt, a court of equity not only sanctions the remedy which the law gives against the surviving partner, but will likewise decree satisfaction out of the estate of a deceased partner. (a)

To a suit in equity instituted against partners, as in a suit brought by them, all the partners must be made parties. This is necessary, in compliance with the general rule, which requires that, to a bill founded on a contract, all those persons should be made parties who are parties to the contract. (b) It is also essential in order that the court may be enabled to dispense complete justice, by deciding upon and settling the rights of all persons interested. (c) But a strict observance of the general rule is not enforced where the parties to be made defendants are too numerous to render it practicable to prosecute a suit, if they were all joined in it; and therefore an individual claiming against a numerous partnership or club, who is not himself a partner, is at liberty to file a bill against a few of the partners or members only. (d) And when one partner is resident in a foreign country, and consequently out of the reach of the process of the court, the suit may be brought against the partner who is within its jurisdiction; and if the omission be excused by the bill, the defendant will be precluded from objecting that his co-partner is not made a party (e); and if a decree be obtained against him, he will be compelled to satisfy the joint demand. (g)

(a) See *post*, where this subject is more fully considered.

(b) *Humphreys v. Hollis*, 1 Jacob, 75. (c) Lord Redesdale's Tr. on Pl. 133.

(d) *Baldwin v. Lawrence*, 2 Sim. & Stu. 26. *Weale v. West Middlesex Waterworks Company*, 1 Jac. & Walk. 358. *Meux v. Maltby*, 2 Swanst. 277. *Cockburn v. Thompson*, 16 Ves. 321. *Weld v. Bonham*, 2 Sim. & Stu. 91.

(e) *Weymouth v. Boyer*, 1 Ves. jun. 416. In *Cockburn v. Thompson*, 16 Ves. 325, Lord *Eldon* said, "there are many instances of justice administered in this court, in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered."

(g) *Darwent v. Walton*, 2 Atk. 510. It is usual where parties are charged by



So where one of the joint owners of a cargo deposited part of the cargo with a factor to sell, and hold a moiety of the proceeds for his separate creditor, it was held that the latter, to a bill filed for an account of the proceeds, need not make the other joint owner a party. (a) And where a bill was filed against two partners, of whom one was abroad, and the partner in this country admitted that he was the agent of his copartner, it was ordered, upon motion, that service of the subpœna upon the partner in *England*, or upon his clerk in court, should be good service upon both. (b) The relief to be obtained against partners through the medium of a bill in equity, corresponds in almost every respect with that which is granted against an individual defendant. The number of the parties, or the fact of their being united as partners, does not necessarily make any difference or variation in the equity administered. That remains immutable, and is as rigorously exacted from those who have formed themselves into an association, as it would be were they the objects of suit in their separate capacities. It is not the parties, but the right, which is regarded. It has been holden that a court of equity has jurisdiction against a corporation on a bill for an account of the profits in the nature of a partnership, and such a bill will be entertained, not only at the instance of a member, but of a stranger. (c) The equitable jurisdiction by injunction, where the effect will be to stop a large trading concern, is exercised with great caution, for an injunction will not be granted *ex parte*, but on notice, giving the defendants an opportunity to oppose it on affidavit. (d)

the bill to be out of the jurisdiction of the court to name them in the prayer of process; because, if they come within the jurisdiction, process may issue against them without amending the bill. But the omission of their names in the prayer of process does not render the record defective. Lord Redesdale's Tr. on Pl. 134. Haddock v. Thomlinson, 2 Sim. & Stu. 219.

(a) Weymouth v. Boyer, *ante*.

(b) Carrington v. Cantillon, Bunb. 107. S. P. Coles v. Gurney, 1 Madd. 187. And see *Ex parte* Peyton, Buck, 200.

(c) Adley v. Whitstable Company, 17 Ves. 315. S. C. 1 Meriv. 107. See also Attorney-General v. Governors of Foundling Hospital, 2 Ves. jun. 42.

(d) Crowder v. Tinkler, 19 Ves. 617.

## SECTION III.

*Proceedings against Partners at the Suit of the Crown.*

BESIDES the liabilities which partners may contract with subjects, the partnership may sometimes be involved in transactions in which the crown is interested. This not unfrequently arises in cases where contraband or uncustomed goods are found in their joint possession, or where one of the partners engages in smuggling, with the consent or privity of the others, and the Attorney-General, on the behalf of the crown, seeks to enforce payment of the penalties imposed by the revenue laws. There, it seems, the partners are either jointly or separately liable, the whole of the penalties being recoverable from them, either in their joint or their individual capacities, at the election of the crown. This doctrine we find laid down by Lord Chief Baron *Pengelly* (a): “If one of several partners is concerned in smuggling on account of the copartnership trade, the crown may come against any one of the partners for the whole penalty, it being in the nature of a tort, and not of a contract; just as in cases of a tort, a subject might come upon any one concerned in the tort.” So, in a case (b) in which wines were imported and entered at the Custom-house, by one party for himself and the firm, and, by a wrong entry in the books, the crown was defrauded of a part of the duties, it was held, on an information being brought for the deficiency, that though the importation and entry were made by a single partner, yet all the persons who composed the firm, at the time of the importation, were liable for the whole to the crown. Nor is it essential, in order to subject partners jointly to penalties, that the goods in respect of which they are incurred should actually come to their joint manual possession; if they are in their power, or in the custody of their agent, or of any person by their direction, it is sufficient. (c) And, if one partner is guilty of aiding and assisting, or is otherwise concerned in unshipping, or in furthering the importation of prohibited and un-

(a) *Attorney-General v. Burges*, Bumb. 223.

(b) *Attorney-General v. Stannyforth*, Bumb. 97.

(c) *Attorney-General v. Burges*, *supra*.

customed goods, he is liable to the penalty, not only for what he, but any of the others may, at the time, smuggle. (a) But partners must all be *participes criminis*; they must be parties to the act of illicit importation, or cognizant of the fact of the goods run being prohibited and uncustomed, or the penalties will not jointly attach upon them. Thus, if two persons join stock together, and buy goods on their joint account, and one of them only is privy to the fact of the goods purchased being run and uncustomed, he alone will be liable to the penalties imposed in respect of the whole quantity, if no actual severance of the goods purchased take place, and no part of them come into the possession of the other. (b) And where a joint purchase of goods is made, for which the purchasers know the duties imposed have not been paid, and, immediately after the purchase, a division of the articles takes place, each person is only liable for the penalties incurred in respect of his share: for, although joint tenants are seized or possessed *per my et per tout*, that is, they are so far possessed of the whole, that none can say, till partition made, that this or that part is not in his possession, yet they, in right and reality, are possessed of no more than their proper share or purparty. As, therefore, they give or dispose of no more, so neither can they forfeit any more. (c) The penalty incurred by each is to be measured and regulated by what comes to his possession; but that must be meant of what really and truly comes into his possession, and not what notionally and virtually only can be said to be in his possession. (d) And, on the same principle, that each is culpable for what he receives, or what comes to his hands, it seems, that a mere temporary, but exclusive custody of uncustomed goods, with a knowledge that they are of that description, is sufficient to render the person having that custody responsible for the whole penalties imposed. Thus, if two persons, knowing that the duties are not paid, buy tea on the joint account of themselves and a third person, and all the tea is intrusted to one of the two persons, whilst the other search for a purchaser, to whom it is sold, and the proceeds are afterwards shared in thirds, an information for the whole penalty may be maintained against the person with whom the tea was so intrusted. (e)

We have seen, that in the case of a judgment and execution against an individual partner for his separate debt, the joint

(a) *Rex v. Manning*, Com. Rep. 616.

(b) *Id. ibid.*

(c) *Co. Litt.* 186: a.

(d) *Rex v. Manning*, *supra*.

(e) *Id. ibid.*



creditors must be satisfied before the separate creditor can render his execution available against his debtor's interest in the joint estate; and the same equity applies where an individual partner is the object of an extent at the suit of the crown, because although, in ordinary cases, the crown is entitled to a preference, yet in such an instance that right of preference operates only upon the interest which the partner himself possesses. If, therefore, an extent against a single partner, and a commission of bankruptcy against the firm, are cotemporaneous in their existence, notwithstanding the latter issue subsequently to the former, the joint creditors are entitled to a priority in respect of payment; and, if the assets are inadequate to the discharge of their demands, the crown is not entitled to any satisfaction from the partnership effects. (a) But where partnership property is seized under an extent against one partner, who, on taking the accounts, proves to be indebted to the firm, the court will not, on motion, grant an *amoveas manus*, until it has been referred to the remembrancer. (b)

Besides, in the instances which have been stated, the rights of the crown may, in other cases, conflict with those of partners. Upon the outlawry of one partner, or his attainder for treason or felony, all the partnership effects become vested in the crown. The share of the party outlawed or attainted is in the first place forfeited; whereby, if the king were capable of being so, he would become joint tenant, or tenant in common of the partnership effects with the other partner; but as this would be inconsistent with the dignity of the monarch, he is strictly entitled to the whole. So, if the interest of one partner vest by contract in the king, he will, as it seems, be entitled to the entirety of the undivided interests of all the partners. The law upon this subject has been ably and elegantly explained by Mr. Justice *Blackstone*, in his Commentaries. (c) He says, "In the several methods of acquiring property by prerogative, there is also this peculiar quality, that the king cannot have a joint property with any person in one entire chattel, or such a one is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner, as the king cannot, either by grant or contract, become a joint

(a) *Rex v. Saunderson*, 1 Wightw. 50.

(b) *Rex v. Rock*, 2 Price, 198.

(c) Vol. ii. p. 409.

tenant of a chattel real with another person; but by such grant or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel (*a*); and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt. (*b*) For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but, where they interfere, his is always preferred to that of another person (*c*): from which two principles it is a necessary consequence, that the innocent, though unfortunate partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances." One good effect of this doctrine, with regard to partnership, is, that it may render a man cautious as to the persons with whom he forms this relation, and that it makes it his interest to strive to preserve them in the path of loyalty and virtue. Besides, although such are the strict rights of the crown, in the mild spirit of modern times, they are not likely ever to be enforced either against creditors, or deserving partners.

(*a*) Fitzh. Abr. t. Dette, 38. Plowd. 243.

(*b*) Cro. Eliz. 263. Plowd. 323. Finch Law, 278. 10 Mod. 245.

(*c*) Co. Litt. 30.

## CHAPTER V.

## SECTION I.

*The Causes of the Dissolution of a Partnership.*

IN the preceding chapters our object has been to ascertain and define what are the consequences legally resulting from the formation of the contract of partnership. These we have endeavoured to explain, both as they regard the rights of partners themselves, and as they relate to the responsibilities which, as a body, they may incur to third persons. It is now to be considered what are the modes and causes by which a partnership, when once constituted, may be and is dissolved. Where the partnership is formed for a single dealing or transaction, it follows that it is at an end so soon as the dealing or transaction in which the partners jointly engage is completed. (a) But where a general partnership is formed, either for a definite or an indefinite period of time, the causes which may operate a destruction of it are various. In the case of a partnership limited as to duration, it may, before the prescribed period of its termination arrives, be dissolved, either by the death, the confirmed insanity, the bankruptcy of all or one of the partners, or it may endure for the stipulated period, and expire with the effluxion of time; but where the partnership is unlimited, as to its existence, although in the instances of death or bankruptcy it is determined, yet, if those accidents do not intervene, any partner may withdraw himself from it whenever he thinks proper. In this respect the law of *England* adopts the rule of the civil law: *Tamdiu societas durat, quamdiu consensus partium integer perseverat.* (b) Besides the causes we have stated as operating a dissolution, a partnership, limited as to duration, may, before the expiration of the time agreed upon for its continuance, be dissolved by the decree of a court of equity, where the conduct of some or all of the partners has been such as to render it impossible to carry on the trade or undertaking on

(a) See *Inst.* lib. 3. t. 20. s. 6.(b) *Cod.* lib. 4. t. 37. l. 5.



the terms stipulated. We will now consider the causes of dissolution under three general heads: first, *the act of God*; secondly, *the act of the party*; and thirdly, *the act or operation of law*.

A dissolution occasioned by *the act of God* may be subdivided into two branches: first, a dissolution which is necessarily effected by *death*; and, secondly, a dissolution which may be the result of *insanity*. By the *death* of one of the partners the contract of partnership is *ipso facto* dissolved. (a) And even where any number of persons, exceeding two, are united as partners, the death of one of them operates a dissolution, unless provision is expressly made to the contrary; and the accounts of that partnership are taken down to the time of the death of the partner. (b) The inducements to form such a contract consist chiefly in the personal character and qualifications of the party, and his representative or legatee may be in all respects a contrast to him. Cases might easily be put in which considerable inconvenience and hardship may arise from the application of this rule, but any relaxation of it would produce much greater and more frequent grievances. It has been objected to the doctrine, that death ends a partnership, that it is unreasonable; but considering what persons might be introduced into a firm, unless it worked a dissolution, there is strong reason for saying that its effect should be such as the law ascribes to it. (c) The contract of partnership being founded on a *delectus personarum*, it would be destructive and subversive of the very foundation of such a contract were the surviving partner bound and compellable to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claimed by representation or assignment from his representative. (d) The reasoning on which this doctrine rests has received a fuller illustration from the civilians than from any authorities in our

(a) *Vulliamy v. Noble*, 3 Meriv. 614.

(b) *Per Lord Eldon*, *Kinder v. Taylor*, M.S.S. *Gillespie v. Hamilton*, 3 Madd. 254. A provision in partnership articles that, upon the decease of one, the surviving partners shall take his share at a valuation, would, it seems, be construed as an implied agreement, that a partnership should subsist among the survivors. *Wrexham v. Hudleston*, 1 Swanst. 514. n.

(c) *Per Lord Eldon*, *Crawshay v. Maule*, 1 Swanst. 509.

(d) *Id. ibid.* S. C. 1 J. Wils. 181.

domestic jurisprudence. According to the Roman law, a partnership was dissolved by the death of either of the partners; and where the number of partners exceeded two, the death of one effected a dissolution among the survivors. *Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit, certam personam sibi elegit: sed et si consensu plurium societas contracta sit, morte unius socii solvitur, etsi plures supersint; nisi in eundem societate aliter convenerit.* (a) So rigidly was this doctrine enforced, that a stipulation for admitting the heir of the deceased into the partnership was declared void. *Nemo potest societatem hæredi suo sic parare, ut ipse hæres socius sit.* (b) *Adeo morte socii solvitur societas, ut nec ab initio pacisci possimus, ut hæres succedat societati.* (c) But the law of England imposes no such restraint; it merely declares that, in the absence of express stipulation to the contrary, a partnership is dissolved by the death of either or any of the partners, the contract not subsisting for the benefit of representatives. (d) Partners are not incapacitated from securing to their families respectively, or from transmitting to their personal representatives, the interests they severally possess in the business in which they have engaged; but such a transmission of interest must be made the subject matter of positive provision and agreement amongst the partners themselves. The right of each partner, by express stipulation *inter se*, to secure a devolution of his interest in the trade upon others at his death, is evidenced by a modern case. (e) There a partnership was formed for ninety-nine years, upon an agreement that, on the death of any of the partners, his share should go and of right belong to his widow during her life, as a provision for her support, and also to enable her to educate and promote her children; and, that after her decease, her share in the joint trade should go and of right belong and appertain unto, and be equally divided among her children, share and share

(a) Inst. lib. 3. t. 26. s. 5. Pothier has thus explained the reason why death operates a dissolution. “*La raison est que les qualités personnelles de chacun des associés entrent en considération dans le contrat de société; je ne dois donc pas être obligé lorsque l’un de mes associés est mort, à demeurer en société avec les autres, parce qu’il se peut faire que ce ne soit que par la considération des qualités personnelles de celui qui est mort, que j’ai voulu contracter la société.*” Pothier *Traité du contrat de Société*, c. 8. s. 3. p. 141.

(b) Dig. lib. 17. t. 2. l. 35.

(c) Dig. lib. 17. t. 2. l. 59.

(d) *Pearce v. Chamberlain*, 2 Ves. sen. 33. *Godfrey v. Browning*, Ib. 34.

(e) *Balmain v. Shore*, 9 Ves. 500.

alike; and although, under the circumstances of the case, it was held that the child of a partner did not take a vested interest in the parent's share during the life of the parent, yet the legality of such a provision was not questioned or disputed. But, without the express assent of his copartner, one partner cannot nominate a person to continue the trade after his death(*a*); although, if the surviving partner himself claims any benefit under the will, he cannot, without renouncing that benefit, refuse to admit a legatee (*b*); nor, because there is a stipulation that upon the death of one particular partner of two, the business shall be carried on by his representatives, does it follow that such a provision extends to admit into the partnership the representatives of the other partner in the event of his previous demise. (*c*) Although a partnership is entered into for a term of years, it is previously dissolved by the death of either of the partners, unless there are express stipulations to the contrary. (*d*) Where it is stipulated by the articles that, upon the death of one, he shall be succeeded by some one he shall appoint, or by his executors, if the person appointed shall not think proper to come into his place on the terms of the partnership, the death puts an end to the concern from the time of the decease of the partner making the appointment, and not upon a dissolution wrought by exclusion of the appointee, for he never became a partner. (*e*) It is not necessary to give notice of a dissolution wrought by death in order to free the estate of the deceased from future liability (*g*); and on this ground a court of equity will not restrain the surviving partners from using the name of a deceased partner in the firm of the trade. (*h*)

With respect to *insanity*, it seems clear that it does not, like death, *per se* work a dissolution of a partnership (*i*); and the effect of the insanity of one partner, as a ground for a court of equity to decree a dissolution, is not yet settled by decision. It appears principally a question of circumstances, to be decided by reference to the particular character of the

(*a*) Godfrey *v.* Browning *ante*.

(*b*) Crawshay *v.* Maule, 1 Swanst. 509.

(*c*) Pearce *v.* Chamberlain, *ante*. (*d*) Gillespie *v.* Hamilton, 3 Mad. 251.

(*e*) Kershaw *v.* Matthews, 2 Russ. 62.

(*g*) Vulliamy *v.* Noble, 3 Meriv. 614.

(*h*) Webster *v.* Webster, 3 Swanst. 490. n.

(*i*) Waters *v.* Taylor, 2 Ves. & Bea. 303.



disease, as permanent or temporary, the terms of the contract and the nature of the undertaking, as imposing on the lunatic an obligation of active interference, for the performance of which he is disqualified, or reserving to him a right of inspection, by the suspension of which the safety of his estate may be hazarded. In such cases the jurisdiction of a court of equity is most difficult and delicate, and to be exercised with great caution. (a) Where, as far as human testimony can establish, the lunacy of the partner is incurable, and he has by the articles contracted to contribute his skill and industry in carrying on the trade, his lunacy furnishes good ground to a court of equity to decree a dissolution; because, as on the one hand, it would be a great hardship upon a person so disordered, if his property were continued in a business which he could not control or inspect, and were thereby subjected to the consequences of the possible imprudence of another; so, on the other hand, it would be difficult to hold the copartner to his contract, when it was perfectly manifest that the other could not execute that for which he had engaged. (b) But, as the duration of the disorder may be protracted or circumscribed, and the degree may admit of variety, it is impossible speculatively to lay down any general rule on the subject; since, such a rule in its application, must vary according as the malady is either confirmed insanity, or mere temporary illness, or dejection of mind (c), and according as the prospect of recovery is speedy or remote. Each case must be governed and decided by its own peculiar circumstances. However, whatever may be the nature of the disorder, one partner cannot, in consequence of such an affliction, put an end to the partnership by his own act; that object can only be attained through the medium of the decree of a court of equity. (d) In one case the court ordered it to be referred to the master to inquire and state whether the defendant (the alleged lunatic) was in such a state of mind as to be capable of conducting the partnership business according to the terms of the articles of copartnership. (e)

(a) *Per Lord Eldon, Waters v. Taylor*, 2 Ves. & Bea. 303.

(b) *Id. ibid. Sayer v. Bennet*, 1 Cox's Ca. 107. S. C. 1 Mont. on Partn. notes p. 16.

(c) *Liardet v. Adams*, Mont. on Part. 90. n. (i).

(d) *Waters v. Taylor*, *supra*. *Sayer v. Bennet*, *supra*. See also *Wrexham v. Hudleston*, 1 Swanst. 514. n. S. C. cited 2 Ves. sen. 34, 35.

(e) *Sayer v. Bennet*, *supra*.

Where no term is expressly limited for the duration of a partnership contract, and there is nothing in the contract itself to fix its existence to any particular period, it is dissoluble *at the will of either party*. (a) Admitting the serious inconveniences which sometimes ensue the application of this principle, it is necessary likewise to contemplate the formidable evils which would attend an opposite doctrine. When persons enter into a partnership without saying how long it shall endure, they are understood to take that course, in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin. To require, therefore, a prospective notice might contravene the intention of the parties, at the same time that its reasonableness would afford a constant subject of dispute. On the one hand, it may be extremely disadvantageous to parties to say, that a partnership shall be dissolved on a given day; on the other, it must be extremely difficult, if not impossible, for a court of equity, by a general rule, to ascertain what is reasonable notice; and the question, whether the particular notice was reasonable or convenient, would be matter of discussion in almost every instance of a disputed dissolution. Considerations of that sort led to the adoption of the rule, that in the case of a partnership subsisting without articles, and for an indefinite period, any partner may, at a moment's notice, terminate the partnership. But, according to the principles on which the dissolution must take place, a partner can very seldom, if ever, have an interest to give notice of dissolution at a period disadvantageous to the general interests of the concern; as where the articles do not prescribe the terms, the law ascertains what shall be the consequence: *viz.* that the whole of the joint property shall be sold off, and the concern wound up. No partner, therefore, can derive a particular advantage by choosing an unseasonable moment for dissolution; as, by so doing, he must suffer in proportion to the extent of his interest in the trade. Nor is it clear that a better rule could be suggested. But whatever is its policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences: if they omit that precaution, courts of justice have no right to redeem them from

(a) *Peacock v. Peacock*, 16 Ves. 50. *Crawshay v. Maule*, 1 Swanst. 508. S. C. 1 J. Wils. 181.

the penalties of their imprudence. In such a case, a dissolution may be brought about by a notice given by any one of the partners to the other, signifying his dissent to the further continuance of the partnership, there being no necessity to resort to a court of equity for its aid and intervention. (a) Here again the law of *England* corresponds with the rule of the civil law. *Manet autem societas eousque donec in eodem consensu perseveraverint. At cum aliquis renunciaverit societati, solvitur societas.* (b) Regularly a partnership for an indefinite period, constituted by deed, can be dissolved only in the same manner in which it was created; and a partnership similarly formed, but limited as to duration, ought, if the partners are desirous of terminating it before the expiration of the time originally agreed upon, to be annulled by deed, according to the maxim, *unumquodque dissolvitur eo ligamine quo ligatur.* But although the partnership is commenced by articles unsealed, in which is contained an agreement for a copartnership deed, it is nevertheless, in legal effect, a partnership formed by parol, and consequently may be dissolved by a verbal notice. (c) And where there is a partnership constituted by deed, a notice that it is dissolved, signed by the parties, for the purpose of being inserted in the Gazette, is sufficient evidence of the dissolution for all purposes against the parties signing it. (d)

The existence of engagements with third persons, which have not come to a conclusion, does not form any objection to a dissolution. For as partners are necessarily entering into contracts from day to day, which cannot all expire at the same period, it would, if their subsistence furnished ground of objection to a dissolution, be hardly possible to dissolve any partnership. The partners cannot, it is true, by a dissolution, relieve themselves from any engagements which they may have contracted with strangers; but, as among themselves, the existence of such engagements cannot prevent a dissolution, either by mutual consent or notice. (e) Articles of partnership frequently contain a provision for a dissolution, upon notice to be given by any one of the partners. In such a case, the mode of proceeding pointed out must be strictly pursued, and a regard to good faith must

(a) *Ex parte Nokes*, 6 June 1801. Cook's MS. (b) Inst. lib. 3. t. 26. s. 4.

(c) *Rackstraw v. Imber*, Holt's N. P. C. 368.

(d) *Doe d. Waithman v. Miles*, 1 Stark. N. P. C. 181. S. C. 4 Campb. 373.

(e) *Featherstonhaugh v. Fenwick*, 17 Ves. 298.



govern the conduct of the partner who withdraws. But if a partnership be commenced for a limited period, with a right reserved to each partner of dissolving it on giving a year's notice, and after the expiration of the period originally agreed upon, it be, by mutual consent, continued, it may then be dissolved by either party at his pleasure. (a) In the absence of an express, there may be an implied, contract, as to the time for which a partnership shall endure (b); and where that is the case, the partnership cannot be destroyed by the act of the party until the contemplated period arrives. However, the purchase of a leasehold interest by a partnership firm does not necessarily manifest an intention, that the partnership contract shall be co-existent with the duration of the lease; although, unquestionably, the purchase may be so made as to imply an agreement that the partnership should last as long as the lease. (c) But if, as a general rule, such an inference were to be drawn from the mere act of purchase, it would apply alike to the acquisition of freehold as of leasehold interests, and consequently, if the partners were to purchase a fee simple, it must, according to that principle, be concluded that they intended the partnership should exist for ever. (d) When the dissolution of a partnership, to which any partner is entitled, is opposed by some of the partners, a court of equity will interfere; and, under such circumstances, it may be more prudent to file a bill, which may not only pray a dissolution, but likewise an account and an injunction, restraining the dissentient partners from executing securities in the name of the firm, and from receiving the partnership debts. (e) There is an instance of an application to a court of equity to inhibit the dissolution of a commercial partnership (g); and it has been said, that on proper grounds such an application may be sustained. (h)

It may be doubted whether, as against a client who, having employed solicitors in partnership, has a right to their united

(a) *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

(b) *Crawshay v. Maule*, 1 Swanst. 508.

(c) *Per Lord Eldon*, *Ib.* 521. S. C. 1 J. Wils. 181.

(d) *Id. ibid.* *Featherstonhaugh v. Fenwick*, *supra.* *Jefferys v. Smith*, 1 Jac. & Walk. 301.

(e) *Master v. Kirton*, 3 Ves. 74. *Lawson v. Morsan*, 1 Price, 303. *Ryan v. Mackmath*, 3 Bro. C. C. 15.

(g) *Chavany v. Van Sommer*, 3 Woodd. Lect. 416. n. S. C. 1 Swanst. 512. n.

(h) 1 Madd. Ch. Pr. 160.

exertions, the solicitors are at liberty to dissolve their partnership, and turn the client over to one of them ; it should seem they have not, as against him, the power of dissolving their partnership (a) ; but, however that may be, a retiring partner can never be considered as a discharged solicitor. The client, after such dissolution of partnership, cannot employ both ; and it would be impossible to maintain, that, if he employ one, the other is let loose, and discharged from all those obligations which he had undertaken. A solicitor under such circumstances, if retained against his former client, must (however high his personal character) be considered, hypothetically, as employed for no other reason except the very improper one, that he had been previously employed by the other party ; and upon the clearest general principle, that cannot be admitted. (b)

The effect of the *marriage* of a *feme sole* partner has never been expressly decided ; but, upon general principles, it would most probably be held to operate a dissolution of the partnership. (c)

Where articles of partnership are entered into, it frequently happens that a precise term is fixed for the duration of the contract. In that case, the partnership, if it do not meet with an intermediate legal or accidental termination, is regularly dissolved by the effluxion or expiration of the period originally stipulated for its existence. A partnership so constituted cannot be defeated by the will of one or of any number of the partners short of the whole of them ; but, of course, if they all agree upon a separation, they may do so at any time.

Besides the instances of dissolution occasioned by the act of God, or effected by the parties themselves, a partnership contract entered into for a term of years, may, in some cases, before the term has expired, be terminated by the *act of the law*. Where it appears that the contemplated undertaking cannot be carried on according to the true intent and meaning of the articles of co-partnership, as if a partnership be formed for carrying into effect a new invention, which, after repeated trials is found impractic-

(a) *Cook v. Rhodes*, in note to 19 Ves. 273.

(b) *Cholmondeley v. Clinton*, 19 Ves. 267. S. C. Coop. 80. ; and see *Beer v. Ward*, 1 Jacob, 82.

(c) *Wats. on Partn* 384. See also 1 Swanst. 517. n.

cable, a court of equity will dissolve it. (a) And although the misconduct of a partner in trifling circumstances, which is not of such a nature as to defeat the object for which the partnership was formed, seems not to be a sufficient cause for dissolving a partnership (b); yet, if the conduct of partners has been such as to render it impossible to carry on the partnership upon the terms on which it was entered into (c), or if one partner be entirely excluded by the others from his interest in the partnership (d), or if there be a gross abuse of good faith between the parties (e) a dissolution will, in such cases, be decreed at the instance and on the complaint of a single partner, notwithstanding the other partners object to it. (g) So violent and lasting dissension seems to be a ground upon which a court of equity will decree a dissolution; as where the parties refuse to meet each other on matters of business; a state of things which precludes the possibility of the partnership business being conducted with advantage. (h) A society for relief in sickness, by means of a fund raised by subscription of the members, has been considered as a partnership, it having no corporate character (i); and where it has been found that the society has existed upon principles which, with reference to the amount of the number of subscribers, and the nature of the subscriptions, made the whole a bubble, the same has been dissolved, each member receiving a portion of the sums subscribed. (k) The court will likewise dissolve friendly societies founded on erroneous principles; and, until a dissolution takes place, will restrain the trustees from making payments which may tend to exhaust the funds. (l)

An *act of bankruptcy* committed by one partner, if followed by a commission and assignment, is a dissolution of the partnership

(a) *Baring v. Dix*, 1 Cox's Ca. 213.

(b) *Goodman v. Whitcomb*, 1 Jac. & Walk. 593. *Liardet v. Adams*, Mont. on Partn. 90.

(c) *Waters v. Taylor*, 2 Ves. & Bea. 299.

(d) *Goodman v. Whitcomb*, *supra*.

(e) *Chapman v. Beach*, 1 Jac. & Walk. 594.

(g) *Baring v. Dix*, *supra*. See *Glassington v. Thwaites*, 1 Sim. & Stu. 129. notes (a) and (b).

(h) *De Berenger v. Hammell*, *cor. Sir L. Shadwell*. *Jarman's System of Conveyancing*, 7th vol. p. 26.

(i) *Beaumont v. Meredith*, 3 Ves. & Bea. 180.

(k) *Buckley v. Cater*, stated 17 Ves. 15. *Pearce v. Piper*, *ibid.* 1. *Beaumont v. Meredith*, *supra*.

(l) *Reeve v. Parkins*, 2 Jac. & Walk. 390.; and see *Ellison v. Bignold*, *ibid.* 503.



for all purposes, as regards the bankrupt partner, by virtue of the relation to the statutes concerning bankrupts, which avoid all the acts of a bankrupt from the time of the act of bankruptcy, and from the necessity of the thing, all his property being vested in his assignees, who become tenants in common of his share of the partnership stock. (a) And with respect to the solvent partner, the bankruptcy of his copartner so far operates a dissolution of the partnership, as to prevent his dealing with the partnership property for future purposes, as if the partnership continued; but in respect of past transactions or claims which were consummate at the time of the bankruptcy, the solvent partner is not prevented from exercising the control which rests with him over the partnership effects, to take care that they are duly applied in liquidation of the partnership debts. (b) With reference to the bankrupt partner, it was for some time doubtful, whether the act of bankruptcy, the commission, or the assignment, should be considered as operating the dissolution. In one case (c), Lord *Mansfield* seemed to conceive that it was the act of bankruptcy: in another case (d), that effect was ascribed by him generally to the bankruptcy. However, from several decisions which have subsequently taken place, it seems now settled, that the joint tenancy is not fully severed until the partner against whom the commission issues is adjudged a bankrupt, but that the dissolution has then a retrospect to the act of bankruptcy. (e) The adjudication that the party is a bankrupt is, indeed, so effectual a dissolution, that the bankrupt himself may, it has been said, insist upon its having terminated the partnership. (g) But if the commission be fraudulently taken out for a purpose foreign to its object, as with the express view thereby of working a disso-

(a) *Hague v. Rolleston*, 4 Burr. 2174. *Smith v. De Sylva*, Cowp. 471. *Ex parte Ruffin*, 6 Ves. 126. *Ex parte Williams*, 11 Ves. 5. *Wilson v. Greenwood*, 1 Swanst 480. S. C. 1 J. Wilson, 223. *In re Wait*, 1 Jac. & Walk. 609. *Per Bayley J.*, 10 East, 426.

(b) *Harvey v. Crickett*, 5 Mau. & Selw. 336. See also *dictum* of Lord Ch. B. *Thomson* in *Coldwell v. Gregory*, 1 Price, 129. S. C. 2 Rose, 149. *Ex parte Blakey*, 1 Glyn & James. 198.

(c) *Fox v. Hanbury*, Cowp. 448.

(d) *Hague v. Rolleston*, *supra*.

(e) *Ex parte Smith*, 5 Ves. 295. *Smith v. Stokes*, 1 East, 363. *Dutton v. Morrison*, 17 Ves. 204. *Barker v. Goodair*, 11 Ves. 78. Upon the issuing of a commission, the assignment by the commissioners has a relation back to the first act of bankruptcy, committed subsequent to the petitioning creditor's debt. *Ex parte Birkett*, 2 Rose, 71.

(f) *Pidcock v. Kilby*, Mont. on Natn. 91. n. (1).

lution of the partnership, the Lord Chancellor will direct it to be superseded at the cost of those at whose instance it was issued, although there be a trading, a debt, and an act of bankruptcy, for the great seal will not permit such an abuse of its process (a). To warrant the granting a *supersedeas*, however, there must be fraud, it not being sufficient to show the existence merely of a by-motive, because a commission is, in a qualified sense, a legal right, like an action, and courts of justice have no concern with, or power to enquire into, the motives of parties who assert a legal right. Therefore, where a creditor of a firm being displeased with the conduct of one of the partners, and being convinced, that if he continued in the concern he would ruin it, arrested all the partners; they, with the exception of the one with whom the creditor was displeased, put in bail, but he remained in prison until two months expired, and then he was made a bankrupt by the creditor, who continued his dealings with the other partners. On a petition being presented by the bankrupt to supersede the commission, on the ground that an unfair use had been made of the same, it being issued for the purpose of dissolving the partnership, so far as respected him, the Vice-Chancellor, after conferring with the Lord Chancellor on the subject, dismissed the petition, observing, that the commission was not affected by any by-object in the petitioning creditor, and that it was not fraudulent on his part, if, without concerting with the other partners, he desired to operate a dissolution, considering it an advantageous measure for himself, that the bankrupt should not continue in a firm with which he had dealings. (b)

An *execution*, likewise, under which all the interest of one partner is seized and sold, is a determination of the partnership as to him: because whatever interest he possessed is divested out of him, and becomes, by the sale, vested in the vendee of the sheriff, who is tenant in common with the solvent partners. (c)

A partnership may likewise be dissolved by an *award*. It is customary in regular partnerships, to insert a clause in the

(a) *Ex parte Browne*, 1 Rose, 151. See also *Ex parte Harcourt*, 2 Rose, 203. *Ex parte Gallimore*, *ibid.* 424.

(b) *Ex parte Wilbran*, 5 Madd. 1. S. C. 1 Buck, 461. And see *Ex parte Bourne*, 1 Glyn & James. 311. But see S. C. 2 Glyn & James. 137. in which the former order was reversed.

(c) *Sayer v. Bennet*, Mont. on Partn. notes, p. 17. In *Fox v. Hanbury*, Cowp. 445, Lord Mansfield assumed that a partnership might be dissolved by an execution. And see *Waters v. Taylor*, 2 Ves. & Bea: 299.

articles, by which the partners covenant to submit to arbitration any matter or thing which may become the subject of controversy or dispute between them. And although in such cases the arbitrators are usually judges of the parties' own choosing, and proceed in a summary way; yet, if duly authorized, their award is considered final, consequently binding upon the parties, unless there should appear just grounds, either at law, or in equity, to set it aside. And it is a mode of dissolving a partnership very frequent amongst merchants and traders, and is considered a ready method of adjusting partnership claims. In order to empower arbitrators to direct a dissolution, it is not necessary for the parties, submitting to arbitration, to give them an express authority for the purpose; since, if two partners refer all matters in difference between them, and the question of the dissolution be, at the time of the reference, a subject of dispute, the arbitrators may dissolve the partnership. (a)

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## SECTION II.

### *The Consequences of the Dissolution of a Partnership.*

HAVING pointed out the various causes which operate a dissolution of a subsisting partnership, and likewise the modes by which a partnership may be dissolved, it now remains to be considered what are the consequences resulting from a dissolution, in whatever manner it is brought about. These may be considered, either as they affect a total or a partial destruction of a partnership, a complete annihilation of a firm, or a dissolution merely for the purpose of making an alteration in it, by the retirement of an old and the introduction of a new member. The consequences which particularly ensue a dissolution occasioned by the bankruptcy or the death of a partner we will separately examine.

Where a partnership is, by notice, by death, or by any other mode of determination, actually ended, as regards all the partners, no one of them can make use of the partnership estate in a manner inconsistent with the winding up of the concern. The object of their original association is then terminated, and their power

(a) *Green v. Waring*, 1 Blackst. Rep. 475.



of employing the joint property in the way of trade ceases. The partners cannot create any new obligations; for after a dissolution nothing remains to be accomplished, except the arrangement of the affairs of the partnership; but, until they are settled, the connection between the partners subsists; and in that sense, and until such a settlement take place, the partnership may be said to continue, and the ex-members of the firm may be sued as existing partners. (a) From the nature of a partnership, engagements may be contracted which cannot be fulfilled during its existence, exposed as it is to sudden and arbitrary terminations; and the consequence, therefore, must be, that, for the purpose of making good outstanding engagements, of taking and settling all the accounts and converting all the property, means, and assests of the partnership, existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and proportions, the legal interest subsists, although, for all other purposes, the partnership is actually determined. (b) The arrangement of the affairs being then the sole object and purpose to be attained after a dissolution, a court of equity will, in all cases, interpose where the conduct of partners is of a description not likely to be attended with such a result. Therefore, if one partner trade with the joint property on his separate account (c), or if he interfere with it otherwise than for the settlement of the joint affairs (d), or if some members of the firm, in closing the transactions, seek to exclude others from a just share in the management (e), a court of equity will appoint a manager or receiver to wind up the concern, and will direct inquiries in what manner it can be wound up most beneficially to those interested. (g) But to justify a call for this summary interference, some fraudulent breach of contract or duty must be shown; for a receiver will not be appointed, merely on the ground of a previous dissolution of the partnership having taken place. (h) In some cases of dissolution by the

(a) *Ex parte Williams*, 11 Ves. 5. *Peacock v. Peacock*, 16 Ves. 57. *Wilson v. Greenwood*, 1 Swanst. 480. S. C. 1 J. Wilson, 223. *Crawshay v. Maule*, *ibid.* 506. S. C. 1 J. Wils. 181.

(b) *Crawshay v. Collins*, 15 Ves. 227. *Natusch v. Irving*, Appendix, *post*.

(c) *Harding v. Glover*, 18 Ves. 281.

(d) *Crawshay v. Maule*, 1 Swanst. 507. S. C. 1 J. Wils. 181. *Heathcote v. Hulme*, 1 Jac. & Walk. 128.

(e) *Wilson v. Greenwood*, 1 Swanst. 481. S. C. 1 J. Wilson, 223.

(g) *Crawshay v. Maule*, *supra*.

(h) *Harding v. Glover*, 18 Ves. 281. *Wilson v. Greenwood*, *supra*.

bankruptcy of one partner, the solvent partner will be enabled to deal solely with the partnership property; and for that purpose will be appointed the receiver of it, but without a salary. (a) Where on a dissolution of partnership, and a bill filed for an account, a receiver was appointed, it was held that the court would not compel the managing partner to deliver up to the receiver, books, deeds, &c. belonging to a third party (a client of the partners), such partner offering free access and inspection, and to assist in making out the bills. (b)

We will now endeavour to explain what is considered as falling under the description of *joint property* at the termination of a partnership. The joint property consists of the remaining stock which existed at the formation of the partnership, with the additions made to it in the course of trade, either during the continuance of the partnership, or subsequently thereto; for if the trade be carried on by one partner with the joint capital, he must account for the profits he may derive. (c) Real estates acquired by the partnership are, as we have seen (d), regarded in no other light than as partnership property, and consequently they form a portion of the joint fund. Nor, as it has been observed, does it matter that the freehold interest purchased by the firm is conveyed to one partner. Such a conveyance does not alter the nature of the purchase, nor affect the rights of the other partners. The property still continues to form an article of joint estate, and, as such, must be brought into the common fund. (e) And where a renewal of the lease of part of the partnership premises is clandestinely obtained by a member of a partnership, dissoluble at pleasure, although it does not follow that all the concerns conducted upon the premises are a part of the joint estate, yet the lease will, on a dissolution, form a portion of the partnership property; because a partner so treating will not be permitted to secure to himself the good-will of the trade, in exclusion of his partners. (g) So mines are, for many purposes

(a) *Ex parte Stoveld*, 1 Glyn & James. 303.

(b) *Dacie v. John*, 1 McClell. & Y. 206.

(c) *Brown v. Vidler*, cited 15 Ves. 223. *Coxwell v. Bromet*, cited *ib.* *Crawshay v. Collins*, *ib.* 229., and 1 Jac. & Walk. 267. *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

(d) See *ante*, p. 32.

(e) *Smith v. Smith*, 5 Ves. 189.; and see *Alder v. Fouracre*, 3 Swanst. 489.

(g) *Featherstonhaugh v. Fenwick*, *supra.* *Wilson v. Greenwood*, 1 J. Wilson, 223

partnership property. They are, like all personal property, liable to debts of the partnership, and debts to the copartnership. (a) But that only is to be considered as copartnership property which belongs jointly to all the partners, whether it arise simply from contributions *inter se*, or is composed in one part of contributions, and in the remaining part of acquisitions made by, or profits derived from, the use and application of the capital formed by such contributions. A distinct and independent fund, belonging to different but not to all the individual members of the firm, which is not commensurate with joint property, and does not succeed to the place of it, does not fall within the meaning of, and is not distributable as joint estate: if it were so distributable, the partners uninterested in such fund would be relieved from the weight of debt which otherwise they must bear, at the same time, probably, that the separate creditors of the actual owners might have claims against it, and who, therefore, would be entitled to priority of satisfaction. For instance, if one joint owner of a ship insure his share or interest, and a loss happen, the money recovered upon the policy will be separate, and not joint property. (b) So, if a partnership consisting of three partners were to sustain an accidental loss, as by fire, and an individual were to make a donation to two of the partners in compensation of their loss, such a gift to the two partners would not render the subject of it partnership property. (c) And in a late case, where it appeared that two *American* citizens and a *French* subject, residing at *St. Domingo*, were in partnership, and were owners of certain ships captured by *British* cruisers, and that the commissioners appointed under the treaty of commerce concluded in the year 1794 between this country and *America*, for awarding compensation to *American* subjects who had suffered losses by capture, for which they could obtain no redress in the ordinary tribunals, had awarded in compensation of the ships of the partnership captured certain sums to the two *Americans*, with express exclusion of the *French* citizen as an alien enemy, it was determined, that the sums so awarded were not partnership property. (d) There the property in

(a) *Fereday v. Wightwick*, 1 Tamlyn's Rep. 250. *Jefferys v. Smith*, 1 Jac. & Walk. 298.

(b) *Ex parte Parry*, 5 Ves. 575.; and see *Ex parte Smith*, 3 Madd. 63. S. C. Buck. 149.

(c) 2 Swanst. 573.

(d) *Campbell v. Mullett*, 2 Swanst. 551.



the ships was irrevocably lost and gone by the capture and condemnation, and the subsequent bounty to the two being matter of liberality and conciliation, but not of strict legal right, could not be considered as resulting to the benefit of all the partners, without contravening the terms of the grant. If, instead of compensation, restitution of the ships had been ordered, the capture would not, perhaps, have altered the property, because it would have been unaffected by the sentence of condemnation. And, in such a case, the *res ipsa* being returned, and remaining *in solido* in the possession of the two partners, nothing would have occurred to have changed its identity, and consequently the rights existing antecedently to the capture would have been restored. (a)

When the common property is ascertained, either partner may insist upon a *sale* of the whole concern. The rights of the partners respectively are then precisely equal: each may require the whole concern to be wound up by a sale, and a division of the produce. One partner has no claim upon his individual proportion of a specific article, nor can he insist upon an exclusive right in it, but he is entitled only to a general arrangement of the partnership concerns, and for that purpose to an account of the produce of the aggregate joint effects. (b) He cannot separate his share from the bulk of the joint property, nor compel his copartner to accept what, according to a valuation, his interest may be worth. (c) That is not the mode in which a court of equity winds up the concerns of a partnership, but in every case in which that court interferes in closing the transactions of a firm, it directs the value of the whole of the joint property, whether real or personal, to be ascertained in the way in which it can be best ascertained, viz. by a sale and its conversion into money. (d) Nor, in the case of a suit instituted for the dissolution of a partnership, where it is clear, from the plead-

(a) *Thompson v. Ryan*, 2 Swanst. 565. n.

(b) *Crawshay v. Collins*, 15 Ves. 229. *Lingen v. Simpson*, 1 Sim. & Stu. 600.

(c) *Featherstonhaugh v. Fenwick*, 17 Ves. 309. See *Natusch v. Irving*, Appendix, *post*.

(d) *Fereday v. Wightwick*, 1 Tamlyn's Rep. 261. In *Rigden v. Pierce*, 6 Madd. 353. where the articles stipulated for an equal division of the partnership property on a dissolution, after payment of the partnership debts, it was held that it necessarily required a conversion into money, and that either party had a right to insist on a sale of the whole.

ings, that all or some of the parties have a right to a dissolution, does the court wait until a final decree is made before it orders a sale. Such a delay might be attended with considerable inconvenience. The record itself disclosing sufficient to entitle the complainant to call for a dissolution, a decree directing a dissolution must necessarily, under such circumstances, be eventually pronounced, and nothing, therefore, can remain but to wind up the concern. The jurisdiction of the court would consequently, in many cases, be rendered extremely mischievous, if it were laid down as an universal rule, that the trade, whether beneficial or not, should be carried on till the cause was finally heard. On general principles, therefore, it is the practice, in the instance of a trading partnership clearly dissolved, or where the right to a dissolution is manifest, at once to put an end to the trade, by directing a sale by interlocutory order on motion, where that measure is required by the evident interest of the parties. (a) In a late case, where it was provided by the articles that, upon the expiration of the copartnership, the stock should be divided, received, and taken by the partners according to their respective interests, it was held, that such a provision could not be literally carried into execution, and therefore, that by the general law of partnership, the settlement of the affairs must be made by *sale*, and a division of the produce. (b)

The joint property being disposed of, the *joint creditors* have the primary claim upon the fund constituted by its produce. This is consonant with the principle *qui sentit commodum sentire debet et onus*; as the partnership property has been acquired by means of partnership debts, it ought first to be applied in discharge of them. It is also for the sake of the partners themselves, that the joint creditors are first to be satisfied; because, in taking the account between the partners, there is that equity affecting each, that he shall be discharged from his liability in respect to partnership debts, before any division of the funds, liable to those debts, takes place between the partners. (c)

(a) *Crawshay v. Maule*, 1 Swanst. 506. 523. S. C. 1 J. Wils. 181. In *Nerot v. Burnard*, 2 Russ. 56., pending an appeal against a decree declaring a partnership dissolved, and directing the property to be sold, and an account, the court upon motion suspended the sale upon the terms of bringing title deeds into the master's office, and giving security for the value of the effects.

(b) *Cook v. Collingridge*, 1 Jacob, 607.

(c) *Campbell v. Mullett*, 2 Swanst. 574.

Besides, it is very possible, and it often happens in fact, that the partners have different interests in the surplus, and out of that, in order to the administration of justice to the partners themselves, a necessity arises, that the partnership debts must be paid, otherwise the surplus cannot be distributed according to equity. (a) Partnership effects, therefore, or their produce, must be applied in liquidation of the outstanding debts, before any of the partners can claim any thing for his share or debt. (b) And as the assignee of a single partner must claim through the medium of the assignor, and can be in no better state than he was, it follows that an assignment by one partner, of his interest in the joint property to secure his separate debt, must continue subject to the payment of joint debts. (c) Independently, however, and subject to the rights of the joint creditors, when an account is taken between partners after a determination of the partnership, each partner is entitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge his copartner in the account with what he has failed to bring in, and with what he has abstracted from the joint fund beyond his just proportion; and nothing will be considered as the share of any of them, but that proportion of the residue, to which each, on a balance of the accounts so taken, may be ascertained to be entitled. (d)

We will now inquire what are the *consequences resulting from a partial dissolution of a partnership*, which may be considered either as they regard the *retiring partner*, or as they affect the *remaining partner*. On the secession of one partner from a firm, it is, generally speaking, agreed, that he shall receive a sum of money (e) or an annuity, proportioned to his share in the

(a) *Ex parte Ruffin*, 6 Ves. 127.

(b) *West v. Skip*, 1 Ves. sen. 456.

(c) *Young v. Keighly*, 15 Ves. 567.; and see the judgment of Lord Mansfield, in *Fox v. Hanbury*, Cowp. 445.

(d) *West v. Skip*, 1 Ves. sen. 242. S. C. 2 Swanst. 586. Where a partner had, during his continuance in the firm, carried the amount of his advances to his private credit, without deducting the property tax, it was held that, after his retirement from the partnership, the continuing partners could not, after a long lapse of time, deduct it, especially as it did not appear that they had ever accounted for it to government. *Parker v. Ramsbottom*, 3 B. & C. 257. S. C. 5 D. & R. 138.

(e) An assignment by a retiring partner of all his interest in the partnership contracts and concern, in consideration of a certain sum at which his interest had been valued, has been held not to be a sale of property within the act requiring an *ad valorem* stamp. *Belcher v. Sikes*, 6 B. & C. 234.



concern, in return for which, he makes over to the partner, who intends continuing the trade, whatever interest he may possess in the joint property. When the consideration for the assignment by the retiring partner of his interest in the concern is an annuity to be paid to him, we have before seen (a) that the income secured must not arise out of and be subject to the fluctuations of the profits of the trade; because, if it be so, all the substantial enjoyment of a partner in the profits will be given; but the annuity must be certain, and be payable at all events, and its amount should be regulated by a reference to the actual *bonâ fide* value of the interest which the retiring partner renounces. In a late case it was agreed, that the continuing partner should, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner, the payment of an annuity by bond, which was conditioned to be void on payment of the annuity, "*or in case he should, at any time after the expiration of the then existing lease, be dispossessed of and compelled to quit the premises without any collusion, contrivance, act, or default of his own;*" the continuing partner obtained a renewal of the lease, and afterwards became a bankrupt, and the renewed lease passed under the assignment of his estate; it was decided that this was not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease. (b) But if the partners cannot arrive at any amicable arrangement, then, as in the case of a total dissolution, the partnership effects are all to be reduced into money, and, after discharging all the demands existing against the firm, the surplus is to be divided amongst all the partners, according to the proportions in which they may be respectively and severally entitled. If, instead of a share of the capital or its profits, there is nothing to be apportioned but a loss, the retiring partner necessarily stands in the same situation as the other partners, and cannot set up any claim in opposition to real creditors. Upon this principle it has been held, that an agreement by which one partner permitted the other (who seceded from the partnership at the time it was insolvent) to withdraw money out of the reach of the joint creditors was fraudulent and invalid, and the retiring partner was compelled to refund. (c) But where no

(a) See *ante*, p. 21.(b) *Holyland v. De Mendez*, 3 Meriv. 184.(c) *Anderson v. Maltby*, 4 Bro. C. C. 425. S. C. 2 Ves. jun. 244. See

fraud is intended or practised, and the dissolution is fairly made between the partners, an agreement by one partner to give to the retiring partner a sum of money for his interest in the concern, will not be invalidated by the circumstance *per se*, of the joint effects being insufficient to pay the joint debts. (a) And on a dissolution, two or more partners may agree, that what was before the joint property of all shall become the separate property of one, although, in such cases, the question, whether that which had been joint has become separate estate, depends upon the *bona fides* of the transaction. The rights of the creditors are indisputable; their equities to have the joint effects applied in liquidation of their debts must be worked out through the medium of the partners, as the joint creditors must be paid, in order to administer justice to the partners themselves. While they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners, and get judgment, and may execute his judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of his judgment; clearly not in respect of any interest he had in the partnership effects while he was a mere creditor, not seeking to substantiate or create an interest by suit. Having, therefore, no lien on the property, the joint creditors, where notice of the dissolution is given, cannot prevent the partners from effectually transferring it by *bonâ fide* alienation; for the circumstance of its having once been joint property does not render it such for ever. (b) If, by *bonâ fide* conveyance, one of the partners becomes a new purchaser, and is put into possession, he is, to all intents and purposes, the owner,

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Parker v. Ramsbottom, 3 B. & C. 257. In *Ex parte* Carpenter, 1 Mont. & M. 1. where, upon the retirement of one partner, the continuing partners taking the concern in its actual state, undertook by deed to indemnify the former, it being then, as to joint effects, insolvent; and upon the death of one and bankruptcy of the other continuing partner, the retiring one had been called upon to pay; it was held that the permitting the one to retire without taking from him the proportion of the deficiency, did not necessarily make the deed fraudulent as against the remaining partners.

(a) *Ex parte* Peake, 1 Madd. 346.

(b) *Ex parte* Ruffin, 6 Ves. 127. *Ex parte* Fell, 10 Ves. 347. *Ex parte* Williams, 11 Ves. 3. *Ex parte* Rowlandson, 1 Rose, 416. Campbell v. Mullett, 2 Swanst. 575.

and joint creditors cannot follow the property into his hands. Possession, however, of the partnership property must be given by the retiring to the remaining partners, according to the nature of the contract; for if no change of possession follow the agreement, agreeably to the contract, the property, as respects joint creditors, is still to be considered as partnership property. (a) If the court were to lay down, that what has, at any time, been joint property, should always remain so, the consequence would be, that no partnership could wind up its affairs; therefore a *bonâ fide* transmutation of the property is understood to be, the act of men dealing fairly in winding up the concern, and it is binding upon the creditors. Where, upon a dissolution of partnership, it was agreed that certain articles of the partnership stock should become the exclusive property of one of the partners, and that a certain fund should be appropriated to the payment of the debts, and that fund afterwards proved insufficient for the purpose, Sir *John Leach* held that the other partner had no lien on those articles in respect of such deficiency. (b) It may here be remarked, that if one partner sells his share in the partnership business to his copartner, who continues, the retiring partner does not necessarily dispose of the goodwill, so as to prevent his carrying on the same business in the immediate neighbourhood; but if it is the intention of the parties that the goodwill should be included in the sale, it must be made a part of the agreement, and the retiring partner must be bound not to carry on the business any longer, or within a certain distance of the place where the partnership business is conducted. (c) The court will in no case interpose by injunction, or entertain a suit upon the mere speculation of possible injury; and therefore where upon a covenant, in articles of partnership between surgeons, that either might dissolve it at the end of seven years, but that in such case the party would not practise, except as a physician, under a heavy penalty, notice of dissolution having been given and an intention expressed by the party giving the notice of his continuing the practice of a surgeon, a demurrer to a bill for an

(a) *Ex parte Harris*, 1 Madd. 583.

(b) *Lingen v. Simpson*, 1 Sim. & Stu, 600.

(c) *Kennedy v. Lee*, 3 Meriv. 441. In the case of *Hardy v. Martin*, 1 Bro. C. C. 418. n. one partner, on retiring from business, gave a bond of 600*l.* to the other, not to carry on the same business within certain limits; and, after a verdict at law for the penalty, the Court of Chancery granted an injunction to stay execution, and directed an issue to take an account of the damage actually sustained.



injunction filed two months before the expiration of the partnership was allowed. (a)

A partnership may be dissolved as between the partners themselves, and still continue legally to subsist as between them and the rest of the world. Since credit is given to the whole firm, justice requires that all those who belonged to it should be bound, while it is supposed to exist. To exempt a retiring partner from this continued responsibility, he must give *notice* that he is no longer a partner, and to such as may be considered apprized of his secession, he will not be answerable for the subsequent acts and engagements of the remaining partners. The object of a partner, on his retirement, must therefore be, in the first place, to effect his discharge from debts and engagements existing at the time of the dissolution; and in the second place, to guard himself against responsibility for acts or engagements to be done or entered into by his copartners in the name of the partnership firm. In what manner this discharge from liability, both to present and future demands, is to be obtained, we will separately consider.

Notwithstanding a dissolution, the retiring as well as the remaining partners continue jointly liable to answer all *debts or engagements* contracted or entered into by the firm *during the existence of the partnership*. The joint creditors may proceed against all the partners; for their agreement to dissolve cannot deprive the creditors of their right of applying for payment to those who are responsible to them. It consequently becomes matter of serious importance to the retiring partner, effectually to absolve himself from the existing claims upon the firm. In the absence of special agreement, it has been stated (b) that this may be done by a sale of the joint stock, and the application of its produce to the discharge of the joint demands; and upon which any of the partners, on a dissolution, has a right to insist. But in the instance of a partial dissolution, although the interest of the retiring partner may be transferred to the other upon very various terms, and through the medium of very different stipulations, yet it most frequently happens, that in consideration of an assignment by the retiring to the continuing partner of his interest in the joint stock, the latter, as a partial recompense, assumes the liquidation of the debts, and indemnifies the re-

(a) *Coates v. Coates*, 6 Madd. 287.; and see *Glassington v. Thwaites*, 1 Sim. & Stu. 133.

(b) See *ante*, p. 234.

tiring partner against any claims that may be made upon him in respect of them. This assumption by the continuing partner of separate responsibility can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor, and the joint creditor cannot sustain an action at law against him alone upon the mere naked effect of such an engagement. Neither can such a creditor, in the event of the bankruptcy of the continuing partner, sustain a claim of proof against his separate estate, unless before the bankruptcy he accede to the proposal held out, and accept him as his separate debtor; because, however great the hardship upon the creditor may be, that the joint stock, to which he may have especially given credit, should, by the dealing of his debtors with each other, be converted into separate estate, yet the legal principle is, that it becomes so converted by the simple force of the contract, and this legal principle is too strong to be controlled in equity, by imposing the obligation of discharging the joint debts as the condition of the conversion. (a) However the covenant of the continuing partner, to pay the joint debts, where it has been recognised by the creditor, has, in many instances, as between the latter and the retiring partner, given rise to questions, as to what shall operate his discharge; but, with a few exceptions, to which we will shortly advert, the result seems to be, that nothing but actual satisfaction can be considered as working a complete and perfect exoneration. In a late case (b), one of three partners, after a dissolution of partnership, undertook, by deed, to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of one partner for the amount, but strictly reserved his right of action against all the three, and retained possession of the original bills; the separate notes having proved unproductive, it was determined that the creditor might still resort to his remedy against the other partners, and that the taking, under such circumstances, the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. So in a case (c) still more recent, where, on a dissolution, it

(a) *Ex parte Freeman*, Buck. 471. *Ex parte Fry*, 1 Glyn & James, 96. But see *Mont. Dig. of New Decis. in Bank.* 2d part, p. 71. and 3d part, p. 126.

(b) *Bedford v. Deakin*, 2 B. & A. 210. S. C. 2 Stark. N. P. C. 178.

(c) *Lodge v. Dicas*, 3 B. & A. 611.

was agreed between two partners, that one should take upon himself to discharge a debt due to a particular creditor, who was informed of the agreement, and expressly undertook to exonerate the other partner from all responsibility; yet, as the debt was not satisfied by the one, nor any fresh security given, it was decided by the Court of King's Bench that the promise of the creditor was without consideration, and did not constitute any defence to an action brought by him against both partners. And where one of three partners retired, and notice was given to a creditor of the firm that the remaining partners had assumed the funds, and would discharge the partnership debts, the creditor assented to this agreement, and transferred the debts due from the old firm to the credit of the new firm, and afterwards drew on the new firm for a part of his balance, which was paid; but the new firm subsequently becoming insolvent, he brought an action for the remainder against all the members of the old firm; it was held, that the retiring partner was liable for all debts incurred before the dissolution of the partnership. (a) In like manner, where a firm of four partners were indebted on a dishonoured bill of exchange, and having afterwards dissolved the partnership, a new firm was formed of three of them, and the holder of the bill indorsed it over to the latter firm, in order, if possible, to obtain payment of it; and whilst the bill was in their possession, the three settled their accounts with the fourth partner, saying that the bill had been satisfied by them, but the bill itself was not produced to or seen by the fourth partner, at the time of such settlement: it was held that this was no defence to the fourth in an action by the holder against all the partners, the bill not having been in fact satisfied by the persons to whom it had been indorsed and handed over. (b) On the same principle the Court of Exchequer has held that a person depositing money with bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank after a dissolution of the original firm, and the constitution of a new one, which consists of some of the members of the old bank and other persons, discharge the partners who have seceded, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period

(a) *David v. Ellice*, 5 B. & C. 196. S. C. 7 D. & R. 690.

(b) *Featherstone v. Hunt*, 1 B. & C. 113.



of four years, and until they become insolvent. (a) That a similar rule prevails in equity is strongly illustrated by a case (b) which was brought under the consideration of Lord *Rosslyn*. There a devisee, in trust for the testator's executrix and her children, was a member of a firm, which was indebted to the testator, at his death, both on bond and on simple contract; and, after the testator's death, the other partners of the firm, with the privity of the executrix, gave to the devisee a bond for the simple contract debt, in trust for the uses of the will; and the executrix having gone abroad, the effects of the testator were, during her absence, managed by the devisee. The firm, of which the devisee was a member, was afterwards dissolved by the secession of one of the partners, and, both the firm and the devisee being solvent, it was agreed, at a meeting of creditors, that the debts of the old firm should be secured by the bonds of the remaining members, of whom one was the devisee, and he, in consequence of such agreement, delivered up, without any communication with the executrix, the bonds for payment of the debts due to the testator's estate, which were cancelled; and Lord *Rosslyn*, on a bill being filed, considered that the outgoing partner was not released from his liability upon the cancelled bond. But although, as partners are jointly liable for all debts due from the firm, no arrangement between themselves can vary the right of the creditor, yet that right may be destroyed by his expressly consenting to accept of the separate security of one partner, in discharge of and in satisfaction of the joint debt. Therefore, if a partnership debt is paid by a bill of exchange, which, when due, and after notice of the dissolution, is renewed by the creditor's taking the separate bill of the remaining partner, the retiring partner is discharged. (c) And if the creditor, by his conduct in taking the separate security of one partner, induce the outgoing partner to allow the remaining partner to receive monies, which otherwise he would have prevented, it seems that the joint

(a) *Gough v. Davies*, 4 Price, 200. It seems that the old firm would continue liable, although the old debt was carried, with the privity of the customer, into the books of the new firm, and placed as an item in their account to the credit of the customer, *Id. Ibid.*; and see *Sleech's case*, 1 Meriv. 563.

(b) *Dickenson v. Lockyer*, 4 Ves. 36.; and see *Heath v. Percival*, 1 P. Wms. 682.

(c) *Evans v. Drummond*, 4 Esp. N. P. C. 89. See also *Paterson v. Zachariah*, 1 Stark. N. P. C. 71.

liability is extinguished. (a) The liability of a retiring partner for a debt due from the firm at the time of his secession may likewise be destroyed, if the creditor afterwards continue his dealings with the remaining partner, and in the course of them, payments are made by the latter to the creditor, without appropriation equal to or exceeding the amount of the debt due at the dissolution. In such a case, the law of *England*, borrowing the rule from the civil law, declares that, in the absence of appropriation, in the first place by the debtor, or by the creditor in the second, the payment shall be ascribed to that debt which is the most burthensome, and if all are equally burthensome, to that which is the oldest in point of time and standing. (b) Thus where, after the retirement of a partner, the creditor joins the transactions of the old and new firm in one entire account, the payments made from time to time by the continuing partner must be applied to the old debt. (c) And, where an individual kept a banking account with an army agent, who afterwards, without the knowledge of his customer, admitted a partner for a limited period, at the expiration of which he retired; and the account being kept as between the individual and the army agent, the latter subsequently became bankrupt; it was decided that payments made by the bankrupt

(a) *Reed v. White*, 5 Esp. N. P. C. 122. See *Robinson v. Read*, 9 B. & C. 449. In *Heath v. Percival*, 1 P. Wms. 682. where two partners in a Goldsmith's trade, being bound in a bond to J. S., dissolved the partnership and divided the stock, and the obligee after the dissolution applied to the partner continuing the business for payment of the bond, but subsequently consented to let the money remain on that partner's agreeing to pay an increased rate of interest, it was held by Lord *Macclesfield* that the changing the interest did not alter the security, as far as regarded the principal sum and the interest originally reserved; for that the bond still continued the bond of both, and that the retiring partner, after the lapse of a great number of years, and after the other partner had become bankrupt, was liable upon the bond. In this case public notice had been given to all the joint creditors, that they were either to receive their money, or to look upon the continuing partner as their paymaster; but the court determined that such a notice, being *res inter alios acta*, could not be binding upon the obligee.

(b) See the elaborate judgment of Sir *W. Grant*, in *Clayton's case*, 1 Meriv. 604. See also *Bodenham v. Purchas*, 2 B. & A. 39. *Simson v. Ingham*, 2 B. & C. 65. *Simson v. Cooke*, 1 Bingh. 452. Although the rule is, that when money is paid generally it ought to be applied to the first items in the account, yet when there are distinct demands, one against persons in partnership, and another against one of the partners only, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual. *Thompson v. Brown*, 1 Mood. & Malk. N. P. C. 40.

(c) *Simson v. Ingham*, 2 B. & C. 65.

to his customer, after the expiration of the partnership, not having been appropriated by either party at the time to the discharge of any particular debt, the retiring partner, according to the principle of law regulating such payments, might consider them as having been made in reduction of the balance due at the termination of the partnership, and that he was not accountable for any sums received by his copartner on account of his customer after the dissolution. (a) So, in a previous case (b), where the plaintiffs had dealt for a length of time with two partners, not knowing that, during a part of the time, they had a third partner, and had furnished them with goods and received payments on account generally; and before the time when the secret tri-partnership was dissolved, goods had been furnished, to cover which bills had been paid to the plaintiffs by the two ostensible partners, which were dishonoured after the secret dissolution of the tri-partnership, and then other goods were furnished as before; yet as the dishonoured bills were afterwards delivered up by the plaintiffs upon the receipt of subsequent good bills, which latter were more than sufficient to cover the debts of the tri-partnership, though not to cover, in addition, the goods furnished after the dissolution of it, it was held, that such delivering up of the old dishonoured bills, upon receipt of the new good bills, was evidence of a particular appropriation of such new bills, in payment and discharge of the old debt, of which the secret third partner might avail himself in an action on the case for goods sold and delivered, brought against him jointly with the other two partners.

When the retiring partner leaves a sufficiency in the hands of the remaining partner to discharge the joint demands, and has sufficient confidence in him to trust to his making the intended application of it, he generally takes care to provide himself with an express indemnity against claims that may, under any contingency, be made upon him. Such an indemnity is usually given in the shape of a covenant contained in the deed of dissolution, whereby the one partner, in consideration of his being allowed to receive all the partnership credits, covenants expressly to pay all the partnership debts, and for the violation of which engagement the law has furnished the covenantee with a remedy by action upon the covenant. An express covenant is,

(a) *Brooke v. Enderby*, 4 B. Moore, 501. S. C. 2 Brod. & Bingh. 70.

(b) *Newmarch v. Clay*, 14 East, 240.



under such circumstances, the most advisable to procure, since being positive in its nature it leaves no room for subsequent altercation or dispute; but where, from the whole of the deed taken together, or from any form of expression in any part of it, an intention is apparent that the party should be bound, a covenant may be implied; and therefore if a court, looking at the whole of the instrument, finds from its language that it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then, though it be not technically couched in the form of a covenant, it is clear that an action of covenant may be maintained. (a) Thus, in a late case (b), it appeared that by indenture between A of the first part, B of the second part, and C of the third part, it was agreed that A should retire from business, and B and C become partners; that the capital employed should be 36,000*l.*, 24,000*l.* of which A should advance for B, and the remaining 12,000*l.* was to be advanced by C. The deed then proceeded, “And whereas an account of all the debts and credits of A in his business of general merchant has been this day taken, and the balance in his favour amounts to 38,033*l.*; and whereas it has been agreed by and between A, B, and C, that the whole of the said debts and credits of A shall be received and paid by B and C, and that the balance of 38,033*l.* shall be accounted for and paid by them in manner hereinafter mentioned; and that for the better enabling them to call in, collect, and receive such credits, A, by an indenture of assignment bearing even date with these presents, hath assigned the same to B and C: Now this indenture further witnesseth that it is agreed that in consideration of 12,000*l.* paid to A by C as his share of the capital, and for raising 24,000*l.* the proportion of A of the capital, the sum of 36,000*l.* part of the 38,033*l.* shall be retained and kept by B and C as their capital and joint stock, and shall belong to them in the following proportions: *viz.* 24,000*l.* thereof to B, and 12,000*l.* thereof to C, and the remaining 2,033*l.* shall be paid to A by instalments at six, twelve, and eighteen months; and in case any of the debts assigned shall prove bad, the loss shall be borne by B and C.” It was held that this deed contained that which amounted to a covenant by B and C to pay the debts due from A in his business at the date of the indenture.

(a) *Stevenson's case*, 1 Leon. 324. *Hollis v. Carr*, 2 Mod. 87.

(b) *Salter v. Houston*, 1 Bingh. 433.

And where a partner had seceded from a partnership under an express indemnity against any claims in respect of the partnership, and had afterwards, by the sentence of a foreign court, been compelled to pay a sum of money for customs imposed by the revenue laws of the country, the Court of Chancery ordered the money to be repaid to him, and would not investigate the merits of the original claim, on the ground that a foreign judgment is not examinable by an English court. (a) So where the defendant entered into a covenant to indemnify the plaintiff from all debts due from a late partnership subsisting between the plaintiff, the defendant, and a third person, and from all suits on account of nonpayment, it was determined that proof on the part of the plaintiff, that proceedings had been instituted in a foreign court against the late partners, for the recovery of a partnership debt, and that a decree passed against them for want of an answer (in consequence of which a sequestration issued against the estate of the plaintiff, and he was obliged to pay the debt) was conclusive evidence in an action on the covenant against the defendant, who was a party to the foreign suit, and who, having notice, ought to have appeared and made his defence, and that the defendant was not at liberty to show that the proceedings were erroneous. (b) But as the object of a covenant of indemnity can only be that of protecting the partner, in whose favour it is made, from demands substantiated to be just, it follows that, to sustain an action for a breach of such a covenant, it must be shown, that the demand, in respect of which the breach is alleged to have been committed, was a debt actually contracted either during the partnership, or subsequently to its dissolution. Thus where, on the dissolution of a partnership between A and B, A covenanted to leave a sum of money in a banker's hands until a stated period as a security against payment of any demands which might be made upon him in respect of debts contracted by B on the credit of the partnership, which sum was after the stipulated time to be paid over to B, subject to such claims as might have been made. B having commenced an action against A on his covenant, assigning as a breach, that although no demand had been made upon him he had prevented B from receiving the money, the Court of Common Pleas held

(a) *Gold v. Canham*, Lord Nottingham's MS. 2 Swanst. 325. S. C. 1 Ca. in Cha. 311.

( ) *Tarleton v. Tarleton*, 4 Mau. & Selw. 21. *Molony v. Gibbons*, 2 Campb. 52.

that it was not sufficient for A in his plea to allege that a demand had been made upon him in respect of a debt, *as being* a debt contracted by B, without showing that the debt was actually so contracted. (a)

The next consideration for an outgoing partner upon a dissolution of the partnership, is to protect himself against liability for *future debts* to be contracted by the house. To create a legal obligation, as partner, it is not necessary in fact, or in law, that the partnership should be still continuing. The legal obligation may arise from the acts of the party at one time, and his forbearance at another time. (b) If a partner, on his retirement from a partnership, neglect to notify its dissolution to the world, he is guilty of a delusion and as he thereby induces strangers to believe that the partnership is continuing, he must abide by the consequences resulting solely from his own negligent imprudence. (c) It has therefore been held that a firm may be bound after the dissolution of a partnership by a contract made by one partner, in the name of the firm, with a person who contracted on the faith of the partnership, and had not notice of the dissolution. (d) And the principle upon which the responsibility of the retiring partner proceeds, being his negligent conduct in forbearing to give notice, and the consequent ignorance of the world of the fact of a dissolution having taken place, he will be liable for the engagements of the other partners, entered into in the name of the firm, even with a party whose dealings began subsequently to the dissolution of the partnership. (e) It may be inferred from what has been stated, that, to exempt the outgoing partner from future liability, notice of the dissolution of the partnership should be sufficiently promulgated to the world. This may be done either by an actual and express notice, or by one which is constructive and implied.

(a) *Want v. Reece*, 1 Bingham 18. S. C. 7 B. Moore, 244.

(b) *Per Abbott C. J.*, *Goode v. Harrison*, 5 B. & A. 157.

(c) Where a partnership is terminated by the death of one of its members, it seems that notice of that event is not necessary to protect the estate of the deceased from future liability. *Vulliamy v. Noble*, 3 Meriv. 619. And the liability of a partner, who notoriously withdraws his name from a firm, is not continued by the circumstance that the deed by which he has professed to assign his share is void for a technical informality. *McIver v. Humble*, 16 East, 174.

(d) *Godfrey v. Turnbull*, 1 Esp. N. P. C. 371. *Osborn v. Harper*, 5 East, 225. *Goode v. Harrison*, *supra*. In *Fox v. Hanbury*, Cowp. 445., Lord Mansfield said, "If partners dissolve their partnership, they who deal with either, without notice of such dissolution, have a right against both."

(e) *Parkinson v. Carruthers*, 3 Esp. N. P. C. 248.



Where notice of the dissolution is expressly given to all the persons with whom the ex-partners had dealings in partnership (and generally speaking this form of notice is the most advisable and proper) (a), the joint responsibility for subsequent acts of individual partners is terminated. Notice of a dissolution is, in legal import and effect, notice of the want of authority of any single partner to bind the firm by his separate act; the communication of such a notice operates, therefore, as a determination of continued liability. Even where a plaintiff was privy to an intention of partners to dissolve their partnership, which was in the course of execution, it was held that, in an action founded upon a supposed subsequent partnership transaction, the plaintiff must show that the intention was abandoned. (b) But express notice of a dissolution to be available must be given to every person entitled to it; for a communication of the fact to one may be rendered nugatory and ineffectual by a neglect to communicate it to another, where the rights of the two arise out of the same transaction. Therefore, if the plaintiff, in an action on a bill of exchange accepted by one of several partners in the name of the firm, be an indorsee, the defendants setting up a defence of want of authority to accept, in consequence of a dissolution of the partnership, must show that the payee had notice of the resolution of the firm to dissolve the partnership, and be no longer answerable for any such bills, and if that be not done, it is not sufficient to prove that the indorsee had notice, for he is entitled to avail himself of any circumstance which would operate in favour of the payee. (c) Bankers ought regularly to give notice of a change in the firm by a circular letter; but such change may also be notified by an alteration of the name in the printed check, and persons who have used the new checks cannot take advantage of the want of a more express notice. (d) What shall be deemed

(a) *Graham v. Hope*, Peake's N. P. C. 154. *Jenkins v. Blizard*, 1 Stark. N. P. C. 418.

(b) *Paterson v. Zachariah*, 1 Stark. N. P. C. 71.

(c) *Rooth v. Quin*, 7 Price, 193.

(d) *Barfoot v. Goodall*, 3 Campb. 147. Where the defendant, part-owner and managing director of a mine, informed the plaintiff that he had sold his shares to others, who would in future be his paymasters; it was held, that the operation of such notice, not being absolute in its terms, was altogether a question for the jury, whether it amounted to a notice that he would not be responsible for any goods subsequently supplied; and that not having been submitted to them, a new trial was granted. *Vice v. Fleming*, 1 Younge & Jerv. 227.

a constructive and implied notice is a little perplexed by the cases which have been decided on the subject, but we will endeavour to extract from them the principles they have established. A notice of the dissolution of a partnership is very commonly inserted in the Gazette, but the insertion of a notice therein is not of itself sufficient to exempt a retiring partner from future responsibility. Such an advertisement, announcing a dissolution, is admissible as evidence of a public notification of the fact; but such evidence is of little avail, unless it be shown that the party entitled to notice was in the habit of reading the Gazette. (a) It has indeed been ruled that in respect of persons who had not any previous dealings with the partnership, an advertisement in the Gazette would be sufficient presumptive evidence to be left to a jury from thence to infer notice of a dissolution, so as to prevent such persons from recovering against the parties who constituted the firm originally upon a security given by one of the parties in the name of the firm after such notice of dissolution. (b) But an advertisement in a common newspaper is not even admissible without proof that the party took in the paper (c); although if the paper be proved to have been received by him it will be admissible, notwithstanding the fact of the dissolution has not appeared in the Gazette. (d) Where the paper containing the advertisement is proved to have been read by the party, or is proved only to have been delivered in the usual course at his house, the jury may reasonably be instructed to consider, whether the attention of a tradesman in reading a newspaper was not likely to be attracted by notices of the dissolution of partnerships, to which the attention of others might not be directed; and it is a question for the jury to determine, whether, under all the circumstances of the case, the party has actually received notice of the dissolution. (e) In the case

(a) *Godfrey v. Turnbull*, 1 Esp. N. P. C. 371. *S. C.* Peake's N. P. C. 155. n. *Leeson v. Holt*, 1 Stark. N. P. C. 186. *Graham v. Hope*, Peake's N. P. C. 154. *Gorham v. Thompson*, ib. 42. *Rex v. Holt*, 5 T. R. 443. *Williams v. Keats*, 2 Stark. N. P. C. 290. See also *Ex parte Usborne*, 1 Glyn & James, 358. A notice of dissolution in the Gazette may be given in evidence without a stamp. *Jenkins v. Blizzard*, 1 Stark. N. P. C. 420.

(b) *Godfrey v. Turnbull*, *supra*. See also *Newsome v. Coles*, 2 Campb. 617.

(c) *Leeson v. Holt*, 1 Stark. N. P. C. 186. And see *Boydell v. Drummond*, 11 East, 144. n. *Norwich & Lowestoff Navigation Company v. Theobald*, 1 M. & Malk. N. P. C. 153.

(d) *Rooth v. Quin*, 7 Price, 193.

(e) *Jenkins v. Blizzard*, 1 Stark. N. P. C. 420. See also *Hovill v. Browning*, 7 East, 161. *Rowley v. Horne*, 3 Bingham, 2.

of a dormant partner whose name has never been announced, he may withdraw from the concern without making the dissolution of the partnership publicly known; for his liability depends upon the mere fact of partnership, and no credit has been given to him personally as a supposed member of the firm. (a) But it seems, that, if the ostensible partner state the existence of the partnership to a party who deals with the firm, the dormant partner is liable until such party has notice of the dissolution. (b)

After the dissolution of a partnership, to which the necessary publicity is given, the partners become so disunited in interest, that the one cannot by any contract or engagement implicate the credit of the others. Therefore, although the remaining partner be intrusted with the settlement of the partnership affairs, he cannot indorse, in the name of the firm so as to bind the retiring partner, a security which formed a part of the joint effects. (c) Nor can he by drawing upon a debtor to the firm in the joint name, and subsequently negotiating the bill, render it an available security against the outgoing partner. (d) Even if such a bill were discounted *bonâ fide*, and the produce applied to the liquidation of the partnership debts, the discounteer could not enforce any claim against the ex-members of the firm, either upon the bill, or for money advanced to the use of the firm. (e) It has, indeed, been supposed that the outgoing partner would not be liable in respect of an indorsement made, in the name of the partnership firm, during the subsistence of the partnership, if the security itself were not negotiated by the remaining partner until after a dissolution. (g) The seceding partners are not responsible, where ample notice of the dissolution has been given, even although the remaining partners continue the trade in the name of the old firm; for they are not bound, as a measure of precaution and for their own protection, to apply to a court of equity for an injunction restraining the remaining part-

(a) *Evans v. Drummond*, 4 Esp. N. P. C. 89. *Newmarch v. Clay*, 14 East, 239.

(b) *Evans v. Drummond*, 4 Esp. N. P. C. 89. It has indeed been said, that if the communication were made after the actual dissolution, the dormant partner would remain liable until notice was given: but this point seems doubtful; for, by the dissolution, the power of the ostensible partner, to bind his former co-partner, ceased. *Id. Ibid.* 3 Stark. on Evid. 1080.

(c) *Abel v. Sutton*, 3 Esp. N. P. C. 108. *S. P. Kilgour v. Finlayson*, 1 H. Bl. 155.

(d) *Kilgour v. Finlayson*, *supra*.

(e) *Id. ibid.*

(g) *Abel v. Sutton*, *supra*.



ners from using the style of the old partnership; it is sufficient to operate their discharge that full notice has been given of their secession from the partnership, and they will not in such case be liable even to a person who was ignorant of the fact of the dissolution, unless it appear that they have subsequently interfered in the management of the business, or allowed their names to be used, or in any way authorised the parties acting in the concern to make use of their names and credit. (a)

In many instances of dissolution the remaining partner is, by agreement, exclusively authorised to arrange the joint affairs, and is to receive the partnership credits, as the fund out of which to discharge the partnership debts. Where this is the case, and notice, as well of the dissolution as of the private arrangement between the partners, is given, a debtor to the firm cannot, by colluding with the outgoing partner, obtain from him a discharge of the debt. A receipt given by the latter for the debt, though dated anterior to the dissolution, will be fraudulent and void, and will not estop the remaining partner from disclosing the transaction and recovering payment. (b) So, if the remaining partner have the exclusive right in equity to all the debts, and a debtor is conscious of that right, a payment to the outgoing partner will not affect the claim of the remaining partner (c); but, without notice, such a payment would discharge the debtor. (d) And where, on a dissolution, it was agreed that the joint debts should be received by an agent appointed by both partners, to which arrangement a debtor acceded, but afterwards one of the partners countermanded the authority given to the agent, and personally demanded the debt, a receipt from such partner in the name of both was held to be a discharge to the debtor. (e)

In investigating the rights and liabilities of a retiring partner, we have anticipated those of a *remaining partner*, which are precisely correspondent. He is individually invested with the same

(a) *Newsome v. Coles*, 2 Campb. 617.; and see *Williams v. Keats*, 2 Stark. N. P. C. 290. Where a retiring partner, in the business of carriers, permitted his name to remain on the cart, and over the house of business, he was held responsible for the negligence of the driver. *Stables v. Eley*, 1 C. & P. 614.

(b) *Henderson v. Wild*, 2 Campb. 561. See *Skaife v. Jackson*, 3 B. & C. 421.

(c) *Duff v. East India Company*, 15 Ves. 213.

(d) *Id. Ibid.*

(e) *Bristow v. Taylor*, 2 Stark. N. P. C. 50. S. C. 6 Mau. & Selw. 156.

power of insisting upon a sale of the joint stock, and the application of its produce in a due and legal course of administration ; but the exercise of that power would necessarily frustrate the very object he has in contemplation, by continuing the trade on his separate account. His liability to discharge past debts is, of course, in all cases, coextensive with that of the retiring partner ; but, generally speaking, he burdens himself with the increased obligation of being separately responsible. Such an engagement, if bottomed on a valuable consideration, will, in the event of his not fulfilling it, subject him to such legal claims only as may arise to his copartner out of its non-observance ; because, as we have seen, the compact of the parties cannot countervail the rights of the creditors, or enable them to sue upon a covenant to which they are not parties, although it is made for their benefit. (a) In a late case (b) where by indenture (reciting that the maker of the deed was indebted in his separate capacity to a banking-house in which he was a partner,) hereditaments were conveyed in trust, to pay such sums as then were, or should afterwards be, owing to the said firm by the maker in his separate capacity ; and also to pay the said maker's just proportion or share of such debts as then were, or should afterwards be, owing from him jointly and as a copartner in the said firm ; and also to pay the several persons, mentioned in a schedule to the said indenture, the several debts therein specified, and due from the maker rateably and in equal proportions ; it was determined that the court, in the construction of the deed, would lean in favour of equal payment of all debts. The partnership creditors will not be permitted, on the one hand, to take in priority to the separate or scheduled creditors, but must come in *pari passu* with them ; on the other hand, the words "just proportion or share," in the clause of the deed speaking of the debts due by the firm in which the maker was a partner, must be understood to mean, not what was due from him to the partnership, or what, as between himself and his partners, he might be bound to contribute to the partnership fund ; but what, in consequence of being a partner, he may owe to the partnership creditors. *Quoad* them, his just proportion is what, with reference to the state of the partnership funds, and the ability of the other partners, he may

(a) *Ex parte* Peele, 6 Ves. 604. *Ex parte* Williams, Buck, 15. *Ex parte* Freeman *Ibid.* 471.

(b) *Wadson v. Richardson*, 1 Ves. & Bea. 109.

eventually be called upon to contribute to the joint debts, so that all those debts may be paid. So, with respect to future engagements, the liability of the continuing partner to perform them is similar to that which the law casts upon the outgoing partner. The latter may, after a dissolution, pledge the credit of the pre-existing firm, and his act will have a binding operation upon the remaining partner, if the fact of the dissolution have not been duly and regularly notified. To secure himself, therefore, against such a possible responsibility, it is incumbent on the remaining partner to apprise the world of the retirement of his copartner from the business.

We have already stated, that where a total destruction of the trade is not contemplated, but one or more of the partners alone renounce it, it is usually stipulated between them that the joint stock shall become the separate property of the remaining partners; and the validity of transfers made in pursuance of such stipulations has frequently been made a point of discussion in courts of equity. This subject we have already partially considered, and shall examine it more at large when we inquire into the consequences resulting from a dissolution by bankruptcy; but the substance of the determinations upon such questions may here be stated to be, that where there has been a fair dissolution of partnership, and one partner, by agreement, retains the partnership effects, the transmutation is so complete, that even joint property, remaining *in specie*, is considered as his separate estate (a), if exclusive possession of the joint property were given to him according to the nature of the contract. (b) And where the remaining partner of an old firm agreed, on the formation of a new partnership, that all securities for money, shares of ships, and debts due to him in respect of the old house, subject to the debts and engagements affecting the same, should become the joint property of the new firm, according to the proportions of capital agreed to be brought in by the new members; yet, although the new members advanced only part of their stipulated capitals, it was decided that the member of the old firm had not any interest in the securities which belonged to the old house, except as a partner of the new firm. (c) But if in such cases the assignment be conditional only, and, in consequence of the non-

(a) *Ex parte Ruffin*, 6 Ves. 119. *Ex parte Williams*, 11 Ves. 3.

(b) *Ex parte Harris*, 1 Madd. 589.

(c) *Young v. Keighly*, 15 Ves. 558.



performance of the condition, the retiring partner file a bill in equity against the remaining partner for an account, alleging fraud in the non-observance of the articles of dissolution, and praying an injunction and receiver, which are ordered, and the remaining partner afterwards become a bankrupt, the subject matter of the assignment retains its original character of joint property. (a)

It remains to be observed, that where there is not a renunciation by the outgoing partner of his right to his proportion of the joint capital, his copartner, if he continue the trade after a dissolution, and employ the common capital in it, will be bound to account for the profits which may be derived (b); although, if the profits are made solely by the skill of the remaining partner, it is said to be the practice of a court of equity to allow him a compensation commensurate with his exertions. (c) But where the profits arise out of the use of the partnership stock mixed with the separate property of the remaining partner, it has been doubted whether the outgoing partner is entitled to insist upon a participation. (d) A court of equity will enforce an agreement made upon the dissolution of a partnership, that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other. (e) And where, on a general reference of all matters in dispute between A, B, and C, copartners, the arbitrators ascertained the capital, including a debt from A, and some dubious debts, and finding the partnership debts and gross value of the stock, awarded the same in specific shares, and directed B to receive and pay all debts, keep accounts, and on a balance of receipts, credit was to be given for A's share against his debt. After the award had been long acted on, it turned out that B received some debts which had been omitted in the account laid before the arbitrators, and on which the award had proceeded; and also good debts to a larger amount than stated, and the Court of Exchequer held, in the absence of all fraud, that A was entitled to an account of such, and also of the dubious debts,

(a) *Ex parte Rowlandson*, 1 Rosc, 416.

(b) *Brown v. Vidler*, cited 15 Ves. 223. *Featherstonhaugh v. Fenwick*, 17 Ves. 298. *Brown v. De Tastet*, 1 Jac. 284.

(c) See the arguments in *Crawshay v. Collins*, 15 Ves. 218. See also *Brown v. Litton*, 1 P. Wms. 142.

(d) *Per Lord Eldon*, 15 Ves. 229.

(e) *Lingen v. Simpson*, 1 Sim. & Stu. 600.

notwithstanding the general reference; but that any over receipts in respect of the good debts was to follow the directions of the award with respect to the dubious debts. (a) It is, perhaps, needless to remark, that the same cause which operates to prevent one partner from maintaining an action against his copartners for work and labour performed on account of the partnership during its subsistence, applies with equal force to such an action for a compensation for services rendered after its dissolution. As where, upon the dissolution of a joint-stock company, two of the members were sued by a creditor of the concern, and they employed the plaintiff, an attorney, and also a member of the company, to defend the suit; it was held, that as he himself derived a benefit from the defence, and was liable to contribute to the expenses, he could not sue his late copartners for the costs. (b)

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### SECTION III.

#### *The Consequences of a Dissolution by Bankruptcy.*

IT is now to be considered what are the consequences resulting from the dissolution of a partnership when it is occasioned by bankruptcy.

The questions which have arisen from partnership bankruptcies are extremely numerous, and many of them excessively complicated. We must attempt, by classification and arrangement, to reduce them to something like order and system. It will then be seen that the great men, who, for a century past, have successively held the great seal, and presided over the bankrupt laws, have displayed a peculiar share of learning and discrimination in this intricate and abstruse department of jurisprudence, and have given a series of enlightened, comprehensive, and consistent decrees upon the subject, admirably calculated for the advancement of trade in general, and for the protection of the rights of the parties more immediately interested.

(a) *Spencer v. Spencer*, 2 Y. & J. 245.

(b) *Milburn v. Codd*, 6 B. & C. 419. S. C. 1 Mann. & Ryl. 238.; and see *Parkin v. Fry*, 2 C. & P. N. P. C. 311.

*All the partners* in a firm may become *bankrupt* together; or *one* only may become *bankrupt*, while the others remain solvent. The first is the most simple case, and we will therefore begin by considering it.

To sustain a joint commission, it is necessary there should have been a *joint trading*; but if the trading continue, it matters not that the partnership has been dissolved. Thus, a commission of bankruptcy has been sustained against a partnership on a debt contracted many years after a dissolution, the sale of partnership goods having been continued. (a) The enumeration of every trade which is sufficient to bring a man or a body of men within the operation of the bankrupt laws, would not only be too tedious, but would be foreign to our purpose: they will be found collected and arranged in the various excellent treatises on the bankrupt laws. (b) On this branch of the subject we will merely notice a recent decision (c), in which an acknowledgment by a person that he was in partnership with another as a trader, who afterwards was declared a bankrupt, was held sufficient to constitute a trading, although no acts of buying or selling were proved to have taken place during the partnership.

A second ingredient requisite to the support of a joint commission is, that *each* of the *partners* should have committed *an act of bankruptcy*. (d) And formerly, if a commission had been taken out against three partners, and two of them only had committed acts of bankruptcy, the commission was void to all purposes; for if all the partners named in it had not been found bankrupts, it could not have been sustained against any. (e) In this respect, however, the law is altered by a recent act of parliament (g), which empowers the Lord Chancellor to supersede a commission of bankruptcy as to one or more of the partners without prejudice to its validity against the rest. And, according to this provision, a joint commission invalid in its concoction, no act of bankruptcy having been committed by one, has been superseded as to him, without prejudice to its

(a) Tarleton v. Backhouse, cited 2 Swanst. 571. See 19 Ves. 464.

(b) See Cook's B. L. (7th ed.) 43. Whitm. B. L. (2d ed.) 7. 1 Mont. B. L. (2d ed.) 4. Eden's, B. L. 2; and see the 6 Geo. 4. c. 16. s. 2.

(c) Parker v. Barker, 3 B. Moore, 226. S. C. 1 Brod. & Bingh. 9.; but see Bromley v. King, 1 Ryan & Mood. 228.

(d) Beasley v. Beasley, 1 Atk. 97. Allan v. Hartley, Cook's B. L. 7.

(e) Id. ibid.

(g) 6 Geo. 4. c. 16. s. 16.



validity as to the other, or his certificate thereunder. (a) So, where a commission was issued against two partners, and another commission was subsequently issued against one of them and three other persons, which latter commission was superseded as to the partner included in the first commission without prejudice as to the other three bankrupts, and the assignees under the second commission sold an estate belonging to one of the three bankrupts; the purchaser having objected that a good title could not be made on the ground that the second commission was altogether void, and that the 6 Geo. 4. c. 16. s. 16. only applied to cases of valid commissions, Sir *John Leach* determined otherwise, and made a decree for specific performance. (b) To sustain a commission against all the members of a firm, the acts of bankruptcy must be committed, either during the trading, or subsequent thereto, and during the existence of a debt contracted when in trade. (c) What are the acts which the legislature has declared to be conclusive evidence of the bankruptcy of traders it will be inconsistent with our object to detail; we will therefore content ourselves with referring to the several digests on the subject, in which those acts are enumerated, and the numerous decisions of the courts upon them are noticed. (d) There are, however, a few cases in which the validity of joint commissions has been disputed, on the ground of there not being any joint act of bankruptcy to support them, and to these we will briefly advert. Where there were two partners in a concern at *Manchester* and in *London*, under different names, and one partner resided at each place, and the *London* partner, being upon a visit for a few days at *Manchester*, occasionally attended the counting-house there, and both partners, afraid of an arrest, left the house of business privately, carrying the books of account with them, it was ruled to be an act of bankruptcy in both. (e) And where two traders, in partnership,

(a) *Ex parte* Bygrave, 2 Gl. & J. 391. The first being a legal commission, the court has no jurisdiction to supersede it as to one party, on a petition by the assignees under a second commission; but the court afterwards, on the petition of the assignees under the first, superseded the second commission as to one of three parties. *In re* Colman, 1 Mont. & M. 15.

(b) *Burlton v. Wall*, 1 Tamlyn's Rep. 113.

(c) *Ex parte* Bamford, 15 Ves. 449. *Ex parte* Dewdney, *ibid.* 495.

(d) Cook's B. L. 72. Whitin. B. L. 13. 1 Mont. B. L. 31. Eden's B. L. 11. See also 6 Geo. 4. c. 16. s. 3, 4, 5, 6, & 8.

(e) *Spencer v. Billing*, 3 Campb. 312.

left their shop, and told their shopman that they did so for the purpose of endeavouring to get some bills of exchange discounted, and directed him to say that they were not in the way, or to make some excuse for them, in case a creditor should call; and a creditor having called on that and the following day when they were both at home, and desired to see either the one or the other of them, the shopman, without further authority, denied them, to which they, being afterwards informed of it, did not object, it was held that the jury were warranted in concluding that they absented themselves from their shop with an intent to delay their creditors. (a) So, a conveyance by a firm of all their stock in trade, debts, and effects, for the benefit of all their creditors, but without the concurrence of every creditor both joint and separate, is an act of bankruptcy. (b) But a conveyance executed by one only of three partners, with intent that it shall not be effective unless executed by all of them, is not, as it seems, an act of bankruptcy. (c) And where one of three bankers, who was the only residing partner at the place where the business was carried on, and who alone transacted the business, absented himself from the banking-house, shut it up, and stopped payment, it was determined that this was not evidence of a joint act of bankruptcy committed by all the three (d); and there is not wanting the authority of Lord *Eldon* to show that such an absenting by one partner does not constitute an act of bankruptcy by each of those who may be united with him in partnership. (e) So, if one of two partners go abroad for the purpose of transacting his business, but not with the intent of avoiding his creditors, and, in consequence of the other partner having contracted a debt in the partnership name and committed an act of bankruptcy, the clerk of the firm goes to the partner abroad, and communicates to him the insolvent state of the house, upon which he expresses his determination

(a) *Capper v. Desanges*, 3 B. Moore, 4. S. C. 8 Taunt. 671. See *Ex parte Gardner*, 1 Ves. & Bea. 77.

(b) *Eckhardt v. Wilson*, 8 T. R. 140. See the cases of *Berney v. Davison*, 4 B. Moore, 126. S. C. 1 Bro. & Bingh. 408.; and *Berney v. Vyner*, 4 B. Moore, 322. S. C. 1 Bro. & Bing. 482.

(c) *Dutton v. Morrison*, 17 Ves. 200. A fraudulent grant by deed made by one partner to his copartner, is an act of bankruptcy in the grantor, though not in the grantee. *Whitwell v. Thompson*, 1 Esp. N. P. C. 68.

(d) *Mills v. Bennett*, 2 Maul. & Selw. 556.

(e) *Ex parte Mavor*, 19 Ves. 543.

not to return, this is not a sufficient act of bankruptcy to support a joint commission. (a) A joint act of bankruptcy concerted between three partners and an attorney, who acted both as their agent and as the agent of the petitioning creditor, is not sufficient to sustain a commission on the petition of the latter, although he was not actually privy to the preconcert. (b)

With respect to the *petitioning creditor's debt*, the amount of it, its nature, and the time when it should have been contracted to sustain a joint commission, differ in no respect from those requisites which the law has imposed to give it validity in the case of a separate commission. It will therefore be sufficient to observe, that it must be a joint debt due from or payable by (c) all the partners, since none other can be made the foundation of an application for a commission against the members of a firm collectively. It must also have been contracted before any of the acts of bankruptcy which are to support the commission were committed. Therefore, where an attorney, after an act of bankruptcy committed by one partner, but, in consequence of a previous retainer, had a sum due to him from the firm; it was held that the debt did not constitute a good petitioning creditor's debt to support a joint commission. (d)

Where there is or has been a joint trading, acts of bankruptcy have been severally committed by each member of a firm, and a legal petitioning creditor's debt to the requisite amount is due from them, a joint commission of bankruptcy may be effectually sustained. But in such a commission, before the late statute, all the ostensible partners must have been included; for a commission being, to some purposes, considered as in the nature of an action at law, it was held that a joint commission against two of

(a) *Ex parte Mutree*, 5 Ves. 576. See *Warner v. Barber*, Holt's N. P. C. 175.

(b) *Prosser v. Smith*, Holt's N. P. C. 442. See also *Ex parte Staff*, Buck, 440.

(c) 6 Geo. 4. c. 16. s. 15. See *Eden's B. L.* 38.

(d) *Ex parte Miller*, Buck. 283. By a late act of parliament it is provided, that if, after adjudication, the debt of the petitioning creditor be found insufficient, the Lord Chancellor may, upon the application of a creditor who has proved a sufficient debt, and whose debt has been incurred *not anterior to that of the petitioning creditor*, order the commission to be proceeded in, and it shall by such order be deemed valid. 6 Geo. 4. c. 16. s. 18. This provision was expressly confined to a debt incurred *not anterior to that of the petitioning creditor*, on account of the doctrine of relation to the act of bankruptcy; for that doctrine cannot be extended beyond the accruing of the debt of the petitioning creditor without destroying the title of the assignees. *Ex parte Birkett*, 2 Rose, 71. *Ex parte Bowness*, 2 M. & S. 479.



several partners could not be supported. (a) If one partner had been an infant, and therefore strictly not an object of the bankrupt laws (b), or if one had laboured under the influence of that dreadful visitation lunacy (c), or had been an uncertificated bankrupt (d), there could not be a joint commission against the others; separate commissions must have been taken out against each individually. This however is remedied by a recent enactment (e), which declares "that any creditor or creditors whose debt or debts is or are sufficient to entitle him or them to petition for a commission against all the partners of any firm, may petition for a commission against one or more partners of such firm; and every commission issued upon such petition shall be valid, although it does not include all the partners of the firm." Before this statute it was not necessary to have included a dormant or secret partner in a commission against the ostensible partners (g); although, where there was a partner abroad, and from the title of the firm, as if it had the word "company" subjoined, it was doubtful whether it consisted solely of the partners in *England*, it would not have been prudent, without inquiry, to have issued a commission against the latter only. (h) Doubts, indeed, have been entertained, whether a joint commission can be supported against the ostensible members of a firm, and a dormant partner whose interest is confined to a share of the profits (i); but probably, as a joint creditor has an election to consider a dormant partner his debtor, and as there is scarcely a partnership in which the members of it are not entitled in

(a) *Allen v. Downes*, Willes' Rep. in not. 474. *Streatfield v. Halliday*, 3 Term R. 779.

(b) *Ex parte Henderson*, 4 Ves. 163. *Ex parte Barwis*, 6 Ves. 601. *Rex v. Cole*, 1 Lord Raym. 444. *O'Brien v. Currie*, 3 C. & P. 283; but see *Ex parte Watson*, 16 Ves. 265.

(c) *Ex parte Layton*, 6 Ves. 440. See *Anon.* 13 Ves. 590.

(d) *Ex parte Martin*, 15 Ves. 114. *Ex parte Bold*, Co. B. L. 12. In a case where an uncertificated bankrupt entered into partnership with another person, and a joint commission issued against them, Sir *William Grant* held, that the creditors of the partnership had no equity against the assignees under the first commission for an account and application to their debts of the property used or acquired in that partnership. *Everett v. Backhouse*, 10 Ves. 94; and see *Ex parte Storks*, 2 Rose, 179. S. C. 3 Ves. & Bea. 105.

(e) 6 Geo. 4. c. 16. s. 16.

(g) *Ex parte Benfield*, 5 Ves. 424.

(h) *Ex parte Layton*, 6 Ves. 438.

(i) *Ex parte Hamper*, 17 Ves. 404. See also *Ex parte Matthews*, 3 Ves. & Bea. 126.

different interests, a commission including him would be upheld on the ground that the joint property must be considered, as regards its distribution under the bankrupt laws, the promiscuous joint property of them all. (a)

Formerly, where there were several partners, it used to be the practice to take out separate commissions against each partner, as well as a joint commission against all of them. (b) This arose, probably, from the difficulty which commissioners found, where only a single commission was taken out, of marshalling the joint and separate estates between the respective classes of creditors, the statute having given no direction for that purpose; but that practice was discountenanced, it having been the common course of the court, upon petition, to make an order for the separate creditors to come in and prove their debts under the joint commission; and that the assignees should keep distinct accounts of the respective estates. (c) And now by a general order (d) made by Lord *Rosslyn*, where there is a joint commission issued, the commissioners are to cause distinct accounts to be kept of the joint and separate estates, and any separate debts due from individual partners, (or where there are inferior partnerships, consisting of some of the bankrupts, debts due from such partnerships (e), ) are to be proved under the joint commission; the respective estates to be applicable in the first instance to the payment of their respective debts.

According to the present practice, a joint commission against all or two or more of the partners, or separate commissions against each of them, may be supported; but it seems that a joint commission against all and a separate commission against any of the partners cannot legally subsist at the same time, if the commission which is prior in point of existence was acted upon and in legal operation (f); because, by the assignment under it, all the interest and effects of the bankrupts or bankrupt will vest in their or his assignees. At law, therefore, if a joint commis-

(a) *Ex parte* Hodgkinson, 19 Ves. 294. *Ex parte* Norfolk, *ibid.* 455. *Ex parte* Watson, *ibid.* 459. *Ex parte* Hunter, 2 Rose, 382.

(b) *In re* Simpsons, 1 Atk. 137. (c) Co. B. L. 9.

(d) 8th March, 1794. 2 Co. B. L. 284. See also *Twiss v. Massey*, 1 Atk. 67. *In re* Powel, Davies, 373.

(e) *Ex parte* Worthington, 3 Madd. 26.

(f) *Warner v. Barber*, 2 B. Moore, 71. S. C. 8 Taunt. 176. *Ex parte* Bullen, 1 Rose, 136.

sion be first issued, and be proceeded in, a subsequent separate commission is invalid; and if a separate commission, which has been opened and is in operation, subsist, a joint one, afterwards sealed, cannot as a matter of course be prosecuted. (a) There is indeed a case apparently militating against this principle, in which, after and during the existence of two separate commissions, which had issued against two of three members of a firm, a joint commission was taken out against the whole firm; and although the question as to the validity of the joint commission was not ultimately decided by the court, yet the late Lord Chief Baron *Thompson* intimated his opinion that it was valid until actually superseded. (b) By a modern act of parliament (c) it is provided, "that if after a commission issued against two or more members of a firm, any other commission or commissions shall be issued against any other member or members of such firm, such other commission or commissions shall be directed to the commissioners to whom the first commission was directed; and immediately after the adjudication under such other commission or commissions, the commissioners shall convey and assign all the estate, real and personal, of such bankrupt or bankrupts, to the assignees chosen in the first commission, and after such conveyance all separate proceedings under such other commission or commissions shall be stayed, and such commission or commissions shall, without affecting the validity of the first commission, be annexed to and form part of the same: provided that the Lord Chancellor may direct that such other commission or commissions be issued to any other commissioners, or that such other commission or commissions shall proceed either separately or in conjunction with the first commission." Where a joint commission has issued against two partners in this country, it forms no ground for superseding it, that there is a prior separate commission in *Ireland* in prosecution against one of them. (d) And although a second commission, where there is a former one in operation against the same parties, is strictly and legally speaking void, yet where the convenience of administering a partnership fund requires it, and it can be done without preju-

(a) *Ex parte Muntton*, 1 Ves. & Bea. 64. *Ex parte Rawson*, *ibid.* 163. *Ex parte Crew*, 16 Ves. 236. *Warner v. Barber*, *ante*.

(b) *Butts v. Bilke*, 4 Price, 241. S. C. 2 Rose, 171. n.

(c) 6 Geo. 4. c. 16. s. 17.

(d) *Ex parte Cridland*, 3 Ves. & Bea. 94. S. C. 2 Rose, 164.



dice to transactions which have taken place under the first commission, the Lord Chancellor will so dispose of a prior separate commission, either by superseding or removing it, as to prevent its being an impediment to the prosecution or validity of a subsequent joint commission. (a) It therefore frequently occurs, that a joint commission is taken out and is sustained after the parties against whom it is directed have been declared bankrupts under separate commissions; by which means, not only is great expense saved, but the joint effects are distributed to better advantage. (b) And if it can be made appear that the bankrupts' estate will be benefited by prosecuting the joint commission, and consequently that the better administration of justice requires it to be upheld, the Lord Chancellor, where no injustice can ensue, will supersede the prior separate commissions (c); and by so doing, he imparts legal validity to the subsequent joint one. (d) In a late case in which a separate commission issued against one of three partners, and afterwards a commission was sued out against two of the firm, the first, as being the least extensive commission, was superseded. (e) So where there are inferior partnerships between some of the partners and different commissions, the court will, in general, support that commission which includes all the partners, and supersede the others. (g) And it is not a sufficient reason against superseding the separate commission, that a separate creditor to a large amount will be thereby divested of his right of voting in the choice of assignees. (h) And, notwithstanding a prosecution is instituted against the bankrupt for not surrendering under the separate commission, it will be superseded to make way for a more extensive commission, if the omission to surrender were from a mistake as to the legality of the commission, and without

(a) *Ex parte Rawson*, 1 Ves. & Bea. 163. S. C. 1 Rose, 423. *Ex parte Pachelor*, 2 Rose, 26. *In re Colbeck*, Buck, 52. Under the 6 Geo. 4. c. 16. s. 16. the court has power to supersede a commission invalid as to one party, because a prior commission had issued against him, without prejudice to its validity against the others included in it. *Burlton v. Wall*, 1 Tamlyn's Rep. 113.

(b) *Ex parte Hardecastle*, 1 Cox, 397. S. C. Co. B. L. 11.

(c) *Ex parte Munton*, 1 Ves. & Bea. 63. S. C. 1 Rose, 433. *Ex parte Pachelor*, *supra*. *Ex parte Crew*, 16 Ves. 237.

(d) *Per Richards B.*, *Butts v. Bilke*, 4 Price, 247.

(e) *Ex parte Smith*, 1 Glyn & James, 256.

(g) *Ex parte Bonbonus*, 8 Ves. 540. *Ex parte Rawson*, 1 Ves. & Bea. 160. S. C. 1 Rose, 423.

(h) *Ex parte Pachelor*, 2 Rose, 26.

any fraudulent intent. (a) But if a bankrupt is exposed to a prosecution for felony in not surrendering to a separate commission, and no circumstances of extenuation appear, that commission will not be superseded solely for the convenience of a joint one. (b) And a separate commission will not be superseded at the instance of the creditors under a joint commission, if there be not any joint effects (c), or if it be apparent that the joint commission cannot be sustained. (d) Nor, as it seems, will it be superseded until the adjudication of bankruptcy under the joint commission. (e) And where a strong objection exists to the interference of the court, and circumstances render the superseding the legal commission inexpedient, as if the certificate of the bankrupt under the separate commission would be thereby destroyed (g), or sales have taken place under it, which consequently ought to be protected, the court, to give effect to the certificate, in the one case (h), or to the sales in the other, will, instead of granting a *supersedeas*, direct the commission and the proceedings (which, being a species of record in bankruptcy, gives the court that authority (i),) to be brought into the bankrupt office, there to be impounded, and not to be produced without the order of the Chancellor. (k) When the separate or joint commission is superseded, the Lord Chancellor will make such equitable arrangements as the circumstances of the case may require (l); and will direct the proofs, taken under the su-

(a) *Ex parte* Lavender, 18 Ves. 18. S. C. 1 Rose, 55.

(b) *Ex parte* Roberts, 2 Rose, 378.

(c) *Ex parte* Rowlandson, 1 Rose, 89. *Ex parte* Wheeler, Buck, 26.

(d) *Ex parte* Roberts, 1 Mad. 72. (e) *Ex parte* Gardner, 1 Ves. & Bea. 74.

(g) It is in the discretion of the court to supersede the first, or, as it has been properly termed, the *legal* commission, whether the bankrupt has got his certificate under it or not. *Ex parte* Cutten, Buck, 60. But in cases where he has obtained it, the court is generally unwilling to supersede. *Ex parte* Hamper, 17 Ves. 413. Thus, in cases where there had been delay on the part of the joint creditors, and the bankrupt's certificate under the separate commission had been before the Chancellor for allowance, the court refused to interpose. *Ex parte* Rowlandson, 1 Rose, 89. *Ex parte* Cutten, *supra*. But where there has been fraud under the separate commission, the circumstance of the bankrupt having obtained his certificate, or even set up in trade again, will be disregarded. *Ex parte* Poole, 2 Cox, 227. *Ex parte* Gillam, *ibid.* 193.

(h) See *Ex parte* Leaverland, 1 Atk. 145.

(i) *Ex parte* Shaw, 1 Glyn & James, 125.

(k) *Ex parte* Tobin, 1 Ves. & Bea. 308. *Ex parte* Rowlandson, 1 Rose, 416. *Ex parte* Rawson, 1 Ves. & Bea. 160. S. C. 1 Rose, 423. *Ex parte* Hamper, 17 Ves. 413. *Ex parte* Thompson, 1 Rose, 285.

(l) *Ex parte* Rawson, 1 Ves. & Bea. 160. S. C. 1 Rose, 423.

perseded commission, though it has become a nullity, to be transferred to, and to be received under the other. (a) And where the rights of the parties evidently require the interposition of a court of law, it will, in case of the existence of two commissions, exercise a species of equitable jurisdiction. Thus where a separate commission issued against A, and a joint commission against A and B, and the assignees under the separate commission obtained a verdict against C; the court ordered the money to be paid into court until a petition, pending before the Lord Chancellor to supersede the separate commission, was decided. (b) If the commission that first issued is superseded, the petitioning creditor is entitled to his costs, unless it was taken out against good faith; and it is not sufficient to deprive him of his right to costs, that he had notice of a docket having been struck against all the members of the firm. (c) But he will not be compelled to attend before the commissioners for the purpose of proving the act of bankruptcy under the subsequent joint commission, because he ought not to be constrained to be a witness to destroy his own proceedings (d); and he is not bound to supersede his commission, because a joint commission has issued. (e) When a joint commission is regularly sued out against two or more partners, it does not abate by the death of one of them, after the bankruptcy has been found. But if one of the firm be dead at the time of issuing the commission, it seems that it is absolutely void. (g)

The legislature, considering that bankrupts have been guilty of a fraud, and, consequently, that they are improper persons to be trusted any longer with the management of their own estate, has appointed other persons in their place, to whom, for the security of their creditors, the commissioners are to assign their effects. We will, therefore, now consider the effect of an *assignment under a joint commission*, and what property, by virtue thereof, vests in the assignees. Mr. Justice Blackstone, in his

(a) *Ex parte Upham*, 17 Ves. 212. *Ex parte Tobin*, 1 Ves. & Bea. 380. *Ex parte Rawson*, *supra*.

(b) *Hodgkinson v. Travers*, 1 B. & C. 257.

(c) *Ex parte Brown*, 1 Ves. & Bea. 60. S. C. 1 Rose, 453.

(d) *Ex parte Stone*, 1 Glyn & James, 7.

(e) *Ex parte Brown*, *supra*. See also *Ex parte Gardner*, 1 Ves. & Bea. 74.

(g) *Beasley v. Beasley*, 1 Atk. 97. *Warrington v. Norton*, Forr. 184. 1 Vern. 154. See also *Ex parte Smith*, 5 Ves. 295. *Ex parte Beale*, 2 Ves. & Bea. 29. 6 Geo. 4. c. 16. s. 26.



Commentaries (*a*), says, that the whole of the property which the bankrupt had in himself at the time he committed the first act of bankruptcy, or that has vested in him since, before his debts are satisfied or agreed for, pass by the assignment. And in an early case (*b*) we find it laid down by Lord Chancellor *King*, that the assignment made by the commissioners under a joint commission, passes as well the separate as the joint estate of the bankrupt partners. Therefore, after such assignment, no property of any kind remains in the bankrupts; and nothing can be taken by the assignees under a separate commission subsequently sued out against any one of them. It has also been said, that notwithstanding the property in a partnership be in one or more members of the firm solely, with an interest in the profits merely in the others, in bankruptcy such property passes as joint property, and is administered with regard to the joint creditors, as the promiscuous joint property of the whole firm. (*c*)

It is often of the utmost importance to determine *what* is to be deemed *joint* and *what* *separate property*, since it not unfrequently happens, that the separate estate is more than sufficient to satisfy all the primary demands upon it, while the joint estate amounts scarcely to any thing, or *vice versâ*. What is to be considered joint property at the termination of a partnership, we have already had occasion to observe (*d*); and, indeed, little difficulty occurs with respect to the nature of the property, where the partnership has continued down to the time of the bankruptcy, and the bankrupts are not at that time, and have not been before, connected with any other firm: but it sometimes happens that a dissolution or a change has taken place in the members of the partnership, or that there are subordinate and distinct partnerships between certain of the members of the principal one. To adjust the clashing interests and claims of

(*a*) Vol. 2. p. 485.

(*b*) *Ex parte* Cook, P. Wms. 500. See also *Ex parte* Baudier, 1 Atk. 98. *Hague v. Rolleston*, 4 Burr. 2174. *Bolton v. Puller*, 1 Bos. & Pul. 547.

(*c*) *Ex parte* Hunter, 2 Rose, 382.

(*d*) See *ante*, p. 252. Mines are, for many purposes, partnership property. They are liable to the debts of the partnership, and debts to the copartnership; and notwithstanding the bankruptcy of a partner indebted to the copartnership, the accounts are to be taken beyond the time of the bankruptcy, and up to the time of the sale; the debts of the partnership are first to be satisfied, and out of the bankrupt's share repayment is to be made to the copartnership of what is due to it from him. *Fereday v. Wightwick*, 1 Tamlyn's Rep. 250.

solvent partners, and of different classes of creditors under such complicated circumstances, is necessarily a matter of much nicety. It is settled that the property, to pass under the commission as joint estate, must have retained that character down to the period of the bankruptcy, for if previously thereto, either by *bonâ fide* contract or otherwise, the joint property of the general partnership be converted into the separate property of an individual partner, or into the joint property of two or more partners, it will devolve upon the assignees in the new character which it has acquired, and be distributable amongst that class of creditors to the satisfaction of whose claims it would in ordinary cases be appropriated. We will therefore inquire how far the contract, or the acts and conduct of the partners, may be considered as giving a different nature and denomination to property, which originally belonged to the whole firm. The cases in which an alteration in the nature of the property has been contended to have taken place by the mere force of contract, have almost universally been those in which, anterior to the bankruptcy, a dissolution of or change in the partnership has been effected, and there the court has given effect to the transmutation upon this principle, that if it were to be held that what at any time, during the partnership, has been part of the joint effects, should in all future time remain so, notwithstanding a *bonâ fide* transfer, no partnership could ever arrange their affairs. (a) But to operate a conversion by contract, the contract, though it need not be in writing (b), and may be either absolute or conditional (c), must be express; for, although the joint property be left in the custody of one or more partners, yet if it be so left, without an agreement having for its object the transmutation of it, the mere dissolution will not produce that effect. For dissolution, simply considered, can only amount to a declaration that the partnership is not to be carried on any farther, except for the purpose of winding up the affairs; and when there is no transfer of the property, each partner is left in possession as a trustee for all, to the extent of enabling each to call upon all to apply the partnership effects to the purposes to which they ought to be applied, even if there was no dissolution. (d) But

(a) *Per Lord Eldon, Ex parte Ruffin*, 6 Ves. 119.

(b) *Ex parte Williams*, 11 Ves. 6.

(c) *Ex parte Fell*, 10 Ves. 348. *Ex parte Rowlandson*, 1 Rose, 416.

(d) *Ex parte Williams*, *supra*.

if joint creditors do not interpose, (and, if they dislike the arrangement, it is competent to them at the time to desire payment of their debts from each of the partners,) and the partners make a fair contract *inter se*; if they do actually dissolve the partnership; if they fully effect a dissolution, with a contract for division of the property; if they make an actual assignment by deed or otherwise; if possession is delivered upon that, and enjoyment makes it perfect; if all these circumstances combine, and there is nothing of fraud impeaching the transaction, then, as is determined in many cases (*a*), the joint property becomes separate property by virtue of that contract, and the joint property is throughout to be treated as separate property, and the joint creditors cannot follow it; but, from the moment of the agreement it becomes the separate estate of the party who has contracted for it, just as much as if he had acquired it in *market overt* of any stranger. Where, however one of three partners assigned his share to *one* of the other two partners, and a separate commission afterwards issued against the third, Lord *Hardwicke* held, that the joint estate of the whole firm should be applied to the payment of the partnership debts (*b*); and Lord *Eldon*, in alluding to that determination, thought that the assignment by *one* partner to *one* only of the two, materially distinguished it from the case of an assignment to *all* the remaining partners. (*c*) But in every case of transmutation, the *bonâ fides* of the transaction is strictly to be examined, and it seems that the length of time which elapses between the assignment and failure of the remaining partners, is evidence of the good faith of the transaction. (*d*) And the transmutation of the property must be complete, and the contract respecting it be executed before the bankruptcy, in order to divest the joint creditors of their right of treating it as joint estate. If the partners conveying their interest are, as a measure of protection, compelled to call in aid the assistance of a court of equity, to exact from the partners, to whom they have assigned, an implicit observance of the terms on which the bargain was made, and that court do extend its re-

(*a*) *Ex parte Titner*, 1 Atk. 186. *Ex parte Ruffin*, 6 Ves. 119. *Ex parte Fell*, 10 Ves. 347. *Ex parte Williams*, 11 Ves. 6. *Ex parte Slow*, Co. B. L. 539. *Ex parte Rowlandson*, 2 Ves. & Bea. 172. S. C. 1 Rose, 416. *Ex parte Peake*, 1 Madd. 346. *Ex parte Harris*, *ibid.* 583.

(*b*) *Ex parte Burnaby*, Co. C. L. 246.

(*c*) *Ex parte Ruffin*, 6 Ves. 129.

(*d*) *Ex parte Williams*, 11 Ves. 6.



lief previously to bankruptcy, by enjoining the latter from interfering with the property and appointing a receiver, the original denomination of the property will not be changed. Thus, where a retiring partner assigned the partnership estate and effects to a continuing partner, and afterwards the continuing partner refused to accept the bills, the stipulated consideration for the assignment; the retiring partner then filed his bill against him, praying an injunction and receiver, which were ordered: upon a subsequent bankruptcy of the continuing partner, it was held, that such interference of the court restored the property to its original character as joint property; unless the retiring partner had, by his conduct, between the time of his obtaining the injunction and the bankruptcy, rendered nugatory the effect of such interference, and upon that an inquiry was directed. (a) So, in all cases of executory agreements, where the farther act necessary to complete the transfer does not happen before the bankruptcy, the nature of the property is not changed by the contract, but retains its character of joint estate. Thus, where a retiring partner assigned and sold all his interest in the concern to the continuing partner, who agreed to pay a debt owing by the former, and also to pay him a stated annuity, for the due payment of which, it was stipulated, that the father of the continuing partner, who was not a party to the assignment, should be security; this was held to be an executory contract, and consequently that, the father having refused to become security, the interest of the retiring partner in the partnership stock was not thereby transferred. (b) Besides, in those instances of contract to which we have alluded, the acts of the partners themselves, exemplified in a course of dealing, may have the effect of changing the quality of that property which originally partook of the nature of joint estate. There can be no doubt, that, as between themselves, a partnership may have transactions with an individual partner, or with two or more of the partners, having their separate estate engaged in some joint concern, in which the general partnership is not interested, and that they may by their acts convert the joint property of the general partnership into the

(a) *Ex parte Rowlandson*, 2 Ves. & Bea. 172. S. C. 1 Rose, 416. If the remaining partner had become bankrupt *before* the bill in equity had been filed, and the injunction and receiver ordered, it seems that the property would have passed to his separate creditors, by virtue of the statute of *James*. Id. *ibid*. And see *post*.

(b) *Ex parte Wheeler*, Buck, 25.

separate property of an individual partner, or into the joint property of two or more partners, or *e converso*. And their transactions in this respect will, generally speaking, bind third persons; and third persons may take advantage of them in the same manner, as if the partnership were transacting business with strangers. For instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership. (a) And where four persons were partners in a banking-house at *Liverpool*, and two of them carried on a separate mercantile concern in *London*, and certain bills of exchange deposited with the house at *Liverpool* to be discounted, were remitted to the house in *London* upon the general account between the two houses, it was determined that the *London* house acquired the property in the bills remitted, and therefore that, upon the failure of both houses, their assignees were entitled to retain them. (b)

We will now endeavour to elucidate another head of transmutation, occasioned by the acts of partners themselves, and this will embrace all the questions affecting partnerships, that have arisen out of the statute of *James* (c), which vests in the assignees such goods as, by the consent and permission of the true owner, the bankrupts have in their possession, order, and disposition, at such time as they shall become bankrupt. In investigating this subject, it is proposed to consider, first, those cases in which previously to bankruptcy, a dissolution of or a change in the partnership has taken place, and the joint property has been left in the exclusive possession of one or more of the former partners; and, secondly, those which have established the principle applicable to a dormant partner, who has suffered his share of the property to continue in the order and disposition of the ostensible partner, down to the time of his bankruptcy. The last division would, perhaps, in point of correct distribution, be more fitly

(a) *Per Eyre C. J.* *Bolton v. Puller*, 1 Bos. & Pul. 539. (b) *Id. ibid.*

(c) 21 Jac. 1. c. 19. s. 11. By the 6 Geo. 4. c. 16. s. 1. this statute is repealed, but the 11th section of the statute of *James* is re-enacted by the 72d section of the repealing statute almost in *totidem verbis*. The adjudged cases, which are detailed throughout the work, and which were decided with reference to the statute of *James*, are therefore retained, for the purpose of explanation, and as guides to the construction to be put upon the statute of Geo. 4.

considered when we treat of the effect of an assignment under a separate commission as it regards separate property, but in order to present a continue view of all the decisions upon this branch of partnership law, it has been thought better to embody them. With regard to the question first proposed for consideration, it may be premised that the principal, and, indeed, the only difficulty in deciding, whether what was originally joint property is still to be deemed the property of all the partners, or the separate property of the possessors, lies in ascertaining whether the latter are alone the reputed owners of it; for the object and spirit of the act is, that where persons are induced to give credit by seeing a bankrupt in possession of property, that property, whether it be the bankrupt's or another's, shall be applied in payment of the debts provable under his commission. It is the principle of discountenancing fictitious credit, and its concomitant frauds, which the statute enforces: indeed there can be no other just ground on which one man's debts are to be paid with the property of another. In furtherance of this principle, it has uniformly been held that such a possession as is calculated to give a delusive credit is a reputed possession within the meaning of the statute. When, therefore, the fact of reputed ownership is settled, the application of the statute is easy; for, from the reputed ownership, false credit arises; from that false credit arises the mischief, and to that mischief the remedy of the statute applies. But to make the statute available to the creditors of the party in whose visible possession the property has been, that possession must continue up to the time of the bankruptcy; for, if withdrawn, *bonâ fide*, by the owner, at any time, however short, before the bankruptcy, the property cannot be reclaimed by the assignees. (a) But a removal made in contemplation of bankruptcy, being fraudulent, will not alter the possession, in consideration of the law. (b) And, to constitute a fraud, on the part of the true owner, it is necessary that the property should be left in the order and disposition of the bankrupt with his consent; where this is not the case, it would rather be to encourage, than to check fraud, if what had been surreptitiously detained were to be divested from the innocent owner, and transferred to the assignees of the bankrupt. (c) In cases of partnership, where the transfer of the joint property

(a) *Jones v. Dwyer*, 15 East, 21. *Ex parte Smith*, 3 Madd. 63. S. C. Buck, 149. *Storer v. Hunter*, 3 B. & C. 368.

(b) *Ex parte Smith*, *supra*.

(c) *Ex parte Richardson*, Buck, 488.



from the retiring to the continuing partners is not made matter of contract, it may be difficult to establish an actual consent to any change in the right to the property taking place; but, although no actual consent can be proved, yet for this purpose the acts and conduct of the parties will warrant the presumption of an assent, and that will be inferred, if, from the time of the dissolution down to the time of the bankruptcy, the retiring partners renounce their equity of having the partnership credits applied in discharge of the partnership debts, and allow the continuing partners to deal as they think fit with the property, and to act with the world respecting it, so as thereby to gain them a false and delusive credit. (a) A dissolution, on the eve of the retirement of a partner, will not, of itself, convert into separate property the joint estate left in the possession of the partners continuing the business; for such a possession is qualified, and is clothed with a trust to apply the property in discharge of the joint debts (b), unless, indeed, the *laches* of the retiring partner has been such as to suffer the joint property to remain in the exclusive possession of the continuing partners for such a length of time as falsely to give them an appearance of substance. (c) And *a fortiori* the statute will not apply to a case where the joint property is wrongfully withheld by one partner, against whom a bill in equity is filed for an account, and an injunction to restrain him from disposing of it, pending which he becomes a bankrupt. (d) But if a new firm be constituted of some of the members of an old firm, either with or without the addition of others, and the whole of the stock in trade of the old firm be delivered over to the new firm, and they be allowed to appear to the world as apparent owners of it, and afterwards become bankrupts, in such case all the effects of the old partnership found in *specie* amongst the property seized under the commission will vest absolutely in the assignees; and though there be outstanding debts of the former firm unsatisfied, these effects so found in *specie* will not be considered as the joint estate of the former firm, either for the benefit of joint creditors, or the partners who have withdrawn. (e) Therefore, where, upon the dissolution of a partnership between a father and his son, it was agreed that until the

(a) See *West v. Skip*, 1 Ves. sen. 242. *Ex parte Ruffin*, 6 Ves. 129.

(b) *Per Lord Eldon, Ex parte Williams*, 11 Ves. 6.

(c) *West v. Skip, supra*.

(d) *Id. ibid.*

(e) *Ex parte Ruffin*, and *Ex parte Williams, supra*. *Ex parte Fell*, 10 Ves. 347.

son was provided for, the father should allow him a third of the profits, and the father afterwards formed a partnership with a third person, and carried into it the stock belonging to the former partnership; on a commission of bankruptcy being awarded against the father and son, it was held that their joint property having been permitted by the son to become the visible property of the new partnership, it must, in the first instance, be applied in satisfying the creditors of that partnership, and that, if afterwards any surplus remained, the share of the father in it would be his own separate property, and therefore subject to the claims of his separate creditors. (a) And again, on the dissolution of a partnership between A, B, and C, three persons as distillers, one of them (to whom the property in fact belonged) leased to C and to one J, the distil-house and premises, and the several stills, vats, and utensils of trade specified in a schedule as used by the former partnership, and C and J were to carry on the business on the premises, which they accordingly did for some time, but afterwards became bankrupts; whereupon a question was raised, whether such stills, vats, and utensils so continuing in the possession of C and J, and used by them in their trade in the same manner as by the former partners, passed under the statute to the assignees, as being in the possession, order and disposition of the bankrupts, at the time of their bankruptcy as *reputed owners*; and it was held that the stills, which were fixed to the freehold, did not pass to the assignees under the words *goods and chattels*, in the statute; but that the vats, &c., which were not so fixed, did pass to the assignees, as being left by the true owner in the possession, order, and disposition (as it appeared to the eye of the world) of the bankrupts, as reputed owners. (b) So, if a country partnership, consisting of three partners, sell their goods in *London* in the names of two of the firm, the property in *London* will, it seems, be in the order and disposition of the two. (c) In cases of conditional transfers by some to the other partners of the joint estate, we have seen that where the condition is not performed before the bankruptcy the nature of the property is not changed by the simple force of the contract; but in such cases, or in cases in which the consideration for the transfer is not paid, the property will still pass as separate estate under the statute, if from

(a) *Ex parte Barrow*, 2 Rose, 252.

(b) *Horn v. Baker*, 9 East, 215. See *Storer v. Hunter*, 3 B. & C. 368.

(c) *Ex parte Hargreaves*, 1 Cox, 440. S. C. 6 Ves 747.

the time of the contract down to the date of the bankruptcy, the assignees are permitted by the assignors to continue in sole possession, and to carry on trade and acquire credit as sole owners of it. There can, indeed, under such circumstances, be no solid distinction between a permitted possession under a contract incomplete as regards the persons contracting, and one which is tolerated by the parties independently of contract. The one must be as productive of the mischief contemplated by the statute as the other, and both ought therefore to be held within its provisions. It has consequently been considered, that an exclusive possession derived under a contract which, as between the parties themselves, has not been performed, is sufficient to operate a conversion of the property if the meaning of the transaction was to transmute, and possession follows accordingly. (a) And in a late case (b) it was observed by Lord *Eldon*, "If one partner puts another into the sole possession of the partnership estate and effects, and leaves them in his sole order and disposition, giving him title under an instrument, upon the face of it giving title, it would be difficult to insist that he would have a lien upon that property, for the consideration money against the separate creditors of the other; considering that he had, by title and his own act, left this property in the sole order and disposition of the other." With respect to the description of property affected by the statute, it is settled that no distinction exists between debts due and other property; for, notwithstanding debts are not assignable at law, they are still within the scope of the statute (c); and where, upon the dissolution of a partnership, they have been assigned by some of the partners to the others, although by the assignment the latter become the true owners of them, yet they will remain in the order and disposition of the partnership, and form part of the joint estate, unless, prior to the bankruptcy, notice of the assignment has been given to the debtors. (d) It is true that a partner stands in a different situation from a stranger, to whom the debts might have been assigned; because in his

(a) *Ex parte Fell*, 10 Ves. 548. *Ex parte Williams*, 11 Ves. 6.

(b) *Ex parte Rowlandson*, 1 Rose, 419.

(c) *Ex parte Ruffin*, 6 Ves. 128. *Ex parte Williams*, *supra*. *Hornblower v. Proud*, 2 B. & A. 329. *Ex parte Enderby*, 2 B. & C. 389.

(d) *Ryal v. Rowles*, 1 Ves. sen. 349. S. C. 1 Atk. 165. *Jones v. Gibbons*, 9 Ves. 407. *Ex parte Monro*, Buck, 300.



character of partner, and independently of any assignment, he is personally competent to receive and discharge them ; but it is also true, that, until notice be given to the debtors, the other partners are equally competent to receive and give acquittances for whatever may be due (*a*) ; besides the assignee, by receiving the assignment without informing the debtors of the transaction, would enable the assignor, if he were so disposed, fraudulently to obtain a fictitious credit with the debtors, and therefore so long as notice is withheld from them, the order and disposition must remain in the partnership. Upon this principle it has been held that debts due to a partnership which, upon a dissolution, are assigned by the retiring partners to the continuing partner (*b*), or debts which, by agreement, on a dissolution, belong to one of the partners (*c*), continue in the order and disposition of the partnership, and consequently to form part of the joint estate, unless, previously to bankruptcy, the debtors were apprized of the assignment or agreement. And it is insufficient in such cases to notify the dissolution only, for, unless express notice of the assignment be given, the order and disposition will not be altered. (*d*) But the operation of the statute, and any question respecting the transmutation of the property, may, in all cases, be avoided, upon the retirement of a partner, by his assigning to the remaining partner all the effects in trust to pay the debts ; because then, notwithstanding there may not be a subsisting joint possession, the property would continue subject to the joint demands, and would not, by the simple fact of possession, be converted into separate estate. (*e*) The statute of *James* is not repealed, and of course those sections of the late general bankrupt act, in which the provisions of the statute of *James* have been embodied, are not rendered inoperative, as to shipping, by the Ship Register

(*a*) *Duff v. East India Company*, 15 Ves. 213.

(*b*) *Ex parte Burton*, 1 Glyn & James. 207.

(*c*) *Ex parte Usborne*, *ibid.* 358.

(*d*) *Ex parte Harris*, 1 Madd. 587. In *Ex parte Usborne*, *supra*, a notice, stating the dissolution of the partnership by mutual agreement, and that all debts due to or from the concern would be received and paid by one of the partners, was inserted in the Gazette ; but Sir *John Leach* held such a notice ineffectual, and that the order and disposition of the debts owing by those debtors who had not express notice of the agreement, remained in the partnership.

(*e*) *Ex parte Fell*, 10 Ves. 347. ; and see *Ex parte Williams*, 11 Ves. 6. *Ex parte Martin*, 19 Ves. 491. S. C. 2 Rose, 331.

Acts (a); for these statutes relate to transfers made by the act of the party only (b), *viz.* from a *former owner* to a *new owner*, and where the transfer is capable of being effectuated in the ordinary way, by the mere operation of an instrument of assignment from the one party to the other, and do not relate to transfers deriving their effect by peculiar provision or operation of law, as assignments by commissioners of bankrupt to assignees under the bankrupt laws do, or titles passing to executors or administrators in case of death. In these cases a title may be transmitted without any of the forms required by the statutes; and as a title may be transmitted without these forms in the case of bankruptcy generally, it may be so done in a case falling within the scope and object of the statute of *James*. (c) Therefore, where A, the owner of a ship, duly assigned his interest in it to B, and B became the registered owner, but by his permission A continued to have the same in his possession, order, and disposition, until he became bankrupt, it was holden that A's assignees were entitled to the ship. (d) And under a commission of bankruptcy against two partners, ships registered in the name of one of them, but in the ordering and disposition of both, form part of the joint estate. (e) On the same principle, a ship registered in the name of two partners, but which is left in the order and disposition of one of them, will pass to the assignees of the latter on his bankruptcy. (g) It is a sufficient compliance with the terms of the registry acts, that the names of the several owners appear on the registry, without its being there stated in what proportions they are interested. Thus where the names of two partners in trade appeared (amongst others) on the certificate

(a) 26 Geo. 3. c. 60. 34 Geo. 3. c. 68. 4 Geo. 4. c. 41. The provision in the 6 Geo. 4. c. 16. s. 72. that nothing therein contained shall invalidate any transfer or assignment of any ship, or any share thereof, made as a security for any debt, either by way of mortgage or assignment, duly registered according to law, seems, independently of authority, to admit that to all other than the excepted cases the enactment applies.

(b) *Bloxham v. Hubbard*, 5 East, 422.

(c) *Robinson v. McDonnell*, 5 Mau. & Selw. 228. *Hay v. Fairbairn*, 2 B. & A. 193. *Monkhouse v. Hay*, 2 Brod. & Bingh. 114. S. C. 4 B. Moore, 549. 8 Price, 256. *Mair v. Glennie*, 4 Mau. & Selw. 240. *Ex parte Hill*, and *In re Sharpe*, Mont. Dig. of New Decis. in Bank. 2d part, p. 85. overruling the cases of *Curtis v. Perry*, 6 Ves. 739. *Ex parte Yallop*, 15 Ves. 60. *Ex parte Houghton*, 17 Ves. 251. S. C. 1 Rose, 177.

(d) *Hay v. Fairbairn*, and *Robinson v. McDonnell*, *supra*.

(e) *Ex parte Burn*, 1 Jac. & Walk. 378.

(g) *Kirkley v. Hodgson*, 1 B. & C. 588.

of registry as owners the Court of King's Bench determined, that the registry acts did not prevent the showing how, and in what proportions, the several owners were respectively interested; and though the partners might derive title under different conveyances, yet, if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners became bankrupts, they were to be considered joint property. (a)

It now remains to be enquired whether the statute applies to, and in what cases it affects the interest a dormant partner may possess in the joint estate. It was for a long time doubtful whether, where a dormant partner suffered the ostensible partner to appear to the world as sole owner of the whole of the partnership property, and to continue as such owner down to the time of his act of bankruptcy, the share or interest of the dormant partner therein was to be considered as being in the order and disposition of the ostensible partner, with the consent of the true owner, within the meaning of the statute. In the first case on this subject, which came before Lord *Hardwicke*, the bankrupt was possessed of undivided property as tenant in common, and it was held not to be such a possession as to make the interest of the other tenants distributable under the commission. (b) In a subsequent case (c) an issue was granted to try the question of partnership, and the result does not appear; but Lord *Alvanley*, then Master of the Rolls, expressed a strong opinion that a secret partnership did not prevent the operation of the statute. But in *Coldwell v. Gregory* (d) the Court of Exchequer expressly decided that a dormant partner was not within the statute; and therefore that where his share of the joint property was suffered to remain in the custody of the ostensible partner who became bankrupt, it did not pass to his assignees, because the bankrupt had such an interest and qualified property in the dormant partner's share as to destroy the essential requisites of a reputed, as distinguished from a true ownership. This latter determination, however, did not meet with general approbation, and its authority was much shaken by what fell from Lord *Eldon* on several occasions. (e) And in a late

(a) *Ex parte Jones*, 4 Maul. & Selw. 450.

(b) *Ex parte Flynn*, 1 Atk. 185.; and see *Mucklow v. Mangles*, 1 Taunt. 318.

(c) *Binford v. Dommett*, 4 Ves. 756. (d) 1 Price, 119. S. C. 2 Rose, 149.

(e) See *Ex parte Barrow*, 2 Rose, 251. *Ex parte Dyster*, ib. 256. *In re Colbeck*, Buck, 53. In *Smith v. Watson*, 2 B. & C. 412., *Best J.*, alluding to the



case, the Court of King's Bench determined that the statute did extend to those cases of tenancy in common in which the bankrupt tenant in common was allowed by his cotenant to appear to the world as sole owner of the property, and to use it for his own exclusive advantage, and to have an order and disposition of it which could only be consistent with a several ownership. There the sole owner of a ship assigned three fourth shares of it to a creditor as a security for his debt, and all the forms required by the Ship Registry Acts, as to the transfer, were duly complied with; but nothing further was done to make it notorious to the world that there had been any such assignment or any change of property; and the sole owner, down to the period when he became bankrupt, was suffered to continue as apparent owner of the whole; and it was decided, that he continued to be the apparent owner of the shares assigned with the consent of the true owner, and therefore that those shares passed to his assignees as property in his order and disposition. (a) The principle of this decision was attempted to be reconciled with that of *Coldwell v. Gregory*, by distinguishing between property which originally belonged to the bankrupt and his cotenant, although the whole was suffered to remain in the visible possession of the bankrupt, and that of which the bankrupt was originally the real and sole owner, and so apparently continued down to the time of his bankruptcy, notwithstanding a conveyance by him of an undivided interest in the property to a third person as a partner. (b) But this distinction appears for that purpose to be unfounded; for in a more recent case in which the

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objection there taken, that a secret partner was virtually excepted out of the statute, observed, "I cannot, indeed, readily conceive any case more completely within the mischief which the enactment was intended to remedy. For, if a secret partnership could be set up as an answer to assignees claiming property which had been left in the order and disposition of the bankrupt, as apparent owner, enormous debts, unconnected with the partnership business, might be contracted upon the credit gained by the possession of property, which a person wholly unknown to the creditors might claim, to the exclusion of their just demands."

(a) *Kirkley v. Hodgson*, 1 B. & C. 588. See 4 Geo. 4. c. 41. s. 44.

(b) See *Lingard v. Messiter*, 1 B. & C. 308. In this case a distinction was drawn between those cases where the bankrupt has once been the owner of property, and where he has not. In the former case, it has been said, that the mere fact of possession may raise a presumption that he continues in possession as reputed owner; but that, in the latter, possession might not of itself show that the bankrupt was reputed owner, and that it would then be necessary for the assignees to establish that fact by other evidence.

property in dispute was originally partnership property, and was originally in the control of one partner alone, and so continued up to the date of his bankruptcy, the same court decided that it was a case not only within the words of the statute, but within the mischief which that enactment was intended to remedy, and, consequently, that the determination of the Court of Exchequer could not be supported. In that case A and B were partners, but the whole of the business was carried on by and in the name of A, B never appearing to the world as a partner; and, at the dissolution of the partnership by effluxion of time, all the partnership stock and effects, by agreement between them, were left in A's hands, who was to receive and pay all the debts due to and from the concern, and to repay, by instalments, the capital brought in by B; A having continued, for a year and a half, to carry on the business as before, became a bankrupt, and it was held, that all the partnership property and effects so left in A's hands, and also the debts due to the concern, passed to his assignees, being in his order and disposition at the time he became bankrupt. (a) And the fact of the dissolution of the partnership previously to the bankruptcy of the ostensible partner, makes no difference; for it has been determined, that where a firm consists of a dormant and an ostensible partner, and the latter becomes a bankrupt, the whole property will pass to his assignees, notwithstanding the partnership is subsisting at the time of the bankruptcy. (b)

Under a *joint* commission, *separate creditors* will be allowed to prove their debts for the purpose of *assenting to*, or *dissenting from*, the *certificate* (c); but they cannot vote in the choice of assignees; for, by the statute (d), only those creditors can vote, who are entitled to prove their debts, by right under the act of parliament, and without an order of the Lord Chancellor. Formerly separate creditors could not prove under a joint commission, without a special application in each particular instance; and although Lord *Rosslyn* made a general order (e), allowing them in every case to prove, yet that does not bring them within the operation of the statute, they being still considered as coming

(a) *Ex parte Enderby*, 2 B. & C. 389.

(b) *Smith v. Watson*, *ibid.* 401.

(c) *Whitm.* B. L. 276.

(d) 5 Geo. 2. c. 30. See the 6 Geo. 4. c. 16, s. 61, 62.

(e) See *ante*, p. 262.

in under the decree or order of a court of equity. (a) If, therefore, the separate creditors elect assignees under a joint commission, the Lord Chancellor will order a new choice. (b) But although the separate creditors cannot vote in the choice of assignees, yet if the separate estates are insufficient to pay the separate creditors, the body of separate creditors will be permitted to appoint an inspector of those estates, on the ground that the joint creditors can have no interest in them. (c)

The assignees, under a joint commission of bankruptcy, are to keep *distinct accounts* of the *joint* and *separate estates* of the bankrupts; and where there are minor partnerships, the accounts of the respective partnerships must be kept distinct under the general order. (d) The joint property of all the partners, and the separate property of each, both, to be sure, pass under such a commission; but they do not form the same fund, and are not to be applied to the same purposes. At law the separate creditor of a partner may take either the separate property of his debtor, or his debtor's share in the joint property, or both, if necessary; and a creditor of the partnership may take the whole joint property, or the whole separate property of any one partner. Under a commission, however, the property seized, whether joint or separate, is no longer disposed of as at law; but, falling immediately under the administration of the Court of Chancery, the effects are subject to a mode of distribution amongst the different classes of creditors, founded as well upon the equity of that court, as upon the general intention of the statutes, that all creditors should have an equal satisfaction. The joint creditors having increased the joint fund, and those who make advances on the separate credit having created the separate fund, natural justice requires, that the funds so constituted shall be applied to the respective demands. It has accordingly been long established as a rule of that court, that where there are different sets of creditors, each estate shall be applied exclusively, in the first instance, to the payment of its own creditors, the joint estate to the joint creditors, and the separate to the separate; and that neither the joint creditors shall come upon the separate estate, nor the separate upon the joint, but only upon the surplus of each that shall remain after each

(a) *Ex parte Parr*, 18 Ves. 65. S. C. 1 Rose, 76. *Ex parte Hamer*, 1 Rose, 321. *Ex parte Jepson*, 1 Ves. 224.

(b) *Id. ibid.*

(c) *Ex parte Batson*, 1 Glyn & James, 269.

(d) Lord Loughborough's order, 8th March 1794. *Ex parte Worthington*, 5 Madd. 26.



has fully satisfied its own creditors respectively. In conformity to this rule of distribution, separate creditors have never been permitted to come in directly upon the joint estate along with the joint creditors; but as the assignment under a joint commission is of the whole estate, as well of the separate estate of each partner as of the joint estate of all the partners, separate creditors have always been allowed to prove under a joint commission, for the purpose of receiving dividends from the separate estate in the first instance, and afterwards from the surplus, if any, of the joint estate after the joint creditors are satisfied. (a) Where there were three firms commencing at different periods, upon the bankruptcy of the firm in which they were all engaged, the Lord Chancellor ordered distinct accounts to be kept of the different partnerships, and of the respective separate estates of the bankrupts. (b) But where there have been various partnerships, and a joint commission is taken out against one firm, in which some of the parties were not engaged, there can only be the common order for keeping the distinct accounts of the joint and separate estates. (c)

We now proceed to the consideration of what are to be deemed *joint*, and what *separate debts*, as regulating the proof against the joint estate under a joint commission. It may be laid down generally, that all debts are proveable against the joint estate for which the partnership was liable. Although this was never doubted, a question has arisen as to the right of a creditor to come upon the joint estate, where he has taken a separate security from an individual partner. It is, however, settled, that such a circumstance makes no difference where the credit was originally joint. Thus, where two partners agreed to borrow a sum of money for the use of the partnership, and one of them only gave a bond for securing the repayment, but the money was afterwards entered in the cash-book of the partnership; a joint commission being taken out against them, the commissioners refused to admit the obligee as a creditor upon the joint estate; but Lord *King* was of opinion he ought to be admitted, and directed accordingly. (d) And where a creditor had lent money to two partners upon their joint notes, and upon the separate bonds of each, and the whole of the money was applied to the use of the

(a) *Cuill. B. L. b. 5. c. 3.*

(b) *Ex parte Marlin*, 2 Bro. C. C. 15.

(c) *Ex parte Parker*, Co. B. L. 249.

(d) *Ex parte Brown*, cited 1 Atk. 225.

partnership, consisting of them and several others, and the partners all agreed to consolidate the separate debts, and to consider them as the debts of the partnership, Lord *Thurlow* permitted the creditor to prove the whole amount against the joint estate of the partnership. (a) So, in a more recent case (b), Lord *Eldon* said, that where money is raised by partners for partnership purposes, by means of bills drawn by one of the members of a partnership, the discounter can sustain a claim of proof against the joint estate in respect of the money received by the firm, although, as regards the bills themselves, there is not a joint legal contract. But if the credit be originally separate, the debt does not become joint from a mere subsequent application of the funds by the debtor to the uses of a partnership of which he is a member. (c) For instance, money borrowed by one partner to pay for an estate, creates only a separate debt; and it does not become joint, if, instead of being applied in payment of the estate, it be employed in discharging partnership debts. (d) So, a loan of money to one partner, and a subsequent loan of it by the latter to the partnership, does not alter the nature of the original loan, so as to entitle the lender to consider himself a creditor of the firm. (e) And where bills drawn by one partner in his individual name, but representing the partnership, were accepted by a dormant partner, it was held that the holder, who was ignorant of the partnership, was entitled to prove them against the separate estates but not against the joint estates; and that, having proved

(a) *Ex parte* Clowes, 2 Bro. C. C. 595. S. C. Co. B. L. 260.

(b) *Ex parte* Bolitho, Buck, 100.

(c) *Ex parte* Emly, 1 Rose, 65. In *Ex parte* Hunter, 1 Atk. 223. Lord *Hardwicke* thought that the mere receipt by the firm was sufficient to enable the creditor to stand in the place of the partner to whom the advance was actually made; and, in his right, to prove against the joint estate. But it seems clear that the law in this case was mistaken.

(d) *Ex parte* Wheatley, Co. B. L. 508, 9.

(e) *Parkin v. Carruthers*, 3 Esp. N. P. C. 248. In *Lloyd v. Freshfield*, 9 D. & R. 19. S. C. 2 C. & P. 325., it was held, that where one partner borrows money on his own private credit, though he afterwards apply it to partnership purposes, the lender cannot charge the partnership with the liability of the single partner. And in *Bevan v. Lewes*, 1 Sim. 376., the Court of Chancery, on the ground that where money is borrowed by a partner, and his own security only given, it cannot be made a partnership debt by being applied to partnership purposes, though with the knowledge of the other partner, determined that such a security constituted the creditor joint proprietor only with the other partner, and he was only entitled to be paid out of the partner's share of the surplus, after satisfying the partnership debts.

against the joint estate, he might withdraw that proof and be admitted a creditor on the two separate estates. (a) But in the absence of proof of a separate contract, the application to partnership uses of money borrowed by one partner, is evidence to show that the debt is joint. (b) And although, to make the debt joint, there must be a contract, expressed or implied by the firm, and the mere receipt of the money is not sufficient evidence from which to imply a contract, yet the justice of the case being that the firm which receives the money should pay the real proprietor, *qui sentit commodum sentire debet et onus*, it will not, perhaps, be the cause of much astonishment that any slight circumstances, in addition to the receipt of the money, have been considered sufficient from which to raise an implied contract. Therefore in a case where a sole trader became indebted by bond, and took in a nominal partner, and some time afterwards a joint commission was issued, Lord *Thurlow* refused to permit the separate creditor to prove against the joint estate. But he said that if any interest had been paid upon the bond by both, he should have considered it as adopting the debt, and making the partnership liable for it. (c) And the courts seem to favour the presumption of the adoption by a new firm of the debts of the old. (d) Thus, where new partners were taken into a trade, and it was agreed that the stock of, and debts due to, the old firm, should become the capital of the new partnership, and that the new firm should take upon themselves the payment of the debts of the old firm, and the new partnership became bankrupts, the creditors of the old were admitted to prove as joint creditors of the new firm. (e) In such cases, however, there must be some evidence of accession on the part of the creditors to the agreement of the parties; because, without it, there cannot be a substitution of debtors. Therefore, where A, a trader, being indebted to several persons, entered into a partnership with B, and brought his stock in trade into the partnership, and by the articles of copartnership it was agreed that the joint trade should pay those creditors of A who were named in a schedule subjoined; it was held that a separate creditor of A, named in the

(a) *Ex parte Husband*, 2 Glyn & James. 4.

(b) *Ex parte Clowes*, *supra*. *Ex parte Bonbonus*, 8 Ves. 540.

(c) *Ex parte Jackson*, 1 Ves. jun. 131.

(d) *Id. ibid.* *Ex parte Peele*, 6 Ves. 604.

(e) *Ex parte Peele*, *supra*. *Ex parte Bingham*, Co. B. L. 509. *In re Staples*, *ibid.* *Ex parte Clowes*, *supra*.



schedule, whose assent before the bankruptcy to the agreement between the parties could not be shown, did not by the articles become a joint creditor of A and B. (a) Where one partner, with the privity of his copartners, applies to the purposes of the partnership money with which he is separately intrusted, the debt may be proved against the joint estate; but if the application to the purposes of the partnership were made without the knowledge of the copartners, the debt can only be proved against the separate estate of the party guilty of the misapplication. The former part of this proposition is strongly corroborated by a recent decision. There one of three partners died intestate, leaving a widow and infant children, and the widow, having administered, agreed with the surviving partners, that the intestate's share of the partnership property should continue in the firm, of which she constituted a member, for a term of years, and the firm became bankrupts. Lord *Eldon* observed, that "the administratrix committed a breach of trust by continuing the money in the trade; and the partners, knowing that a certain proportion belonged to the children, who, being infants, could not contract, held the money on the only terms on which they could hold it as debtors to the children; as if it had been placed with them by way of direct loan. If it had been for the benefit of the children to prove against the separate estate of their mother, they might have done so; but it did not follow that they might not prove under the joint commission against the partnership, having possessed the property of the infants under circumstances raising a clear *assumpsit*." (b) And in a preceding case (c), where one of two partners applied trust-money in the trade, *with the privity* of the other partner, and they afterwards separated, and the partnership effects were assigned over to the first, who undertook the payment of the debts; this was held not to operate the discharge of the other partner, but that both were liable to make good the trust-money. So, if a sum be paid to one trustee on account of the trust fund, and he lend it upon note to his co-trustee, and both the trustees become bankrupts, the debt may be proved under each commission. (d) But the liability of the firm in these cases

(a) *Ex parte Williams*, Buck, 13. *Ex parte Freeman*, *ibid.* 471. *Ex parte Fry*, 1 Glyn & James. 96. But see Mont. Dig. of New Decis. in Bank. 2d part, p. 71. and 3d part, p. 126.

(b) *Ex parte Watson*, 2 Ves. & Bea. 414.

(c) *Smith v. Jameson*, 5 T. R. 601.

(d) *Keble v. Thompson*, 3 Bro. C. C. 112.

depends on the knowledge the other members have of its being trust-money, and therefore if one partner, being a trustee, bring trust-money into the trade without the knowledge or privity of his copartner, it cannot be proved against the joint estate as a joint debt; for although the partner abuses his trust, and advances the money to the partnership, it will not raise a contract between the partnership and the *cestuique trust*, nor convert the innocent partners into implied trustees. (a)

Where a creditor, in respect of the contract of his debtors, is, at law, both a *joint and a separate creditor*, the rule in bankruptcy restrains his legal rights, and compels him, for the benefit of the other creditors, to renounce one of his legal characters. He must, according to the rule of the court now firmly established, make his *election*, in the first instance, whether he will come in upon the joint or the separate estate, that is, against which estate he will prove in *preference*; for whichever he may elect, he will be entitled to participate in the surplus of the other, if there should be any. (b) Thus, where a joint commission was taken out against two partners, and the petitioner was a bond creditor, to whom the bankrupts were jointly and severally bound; it was held that he must make his election to come upon the joint or separate estate; if he elected the former, he could not come upon the latter (and so *vice versa*) for the surplus of the debt, until the creditors of the separate estate were satisfied. (c) And Lord *Hardwicke* founded his order upon this reasoning, that the bond creditor might have brought a separate action at law against each of them, and might have had likewise separate executions, but could not have levied his debt upon both the estates at the same time, but only for the deficiency, where one estate was not sufficient to satisfy the whole. The same doctrine is established in many other cases. (d) Lord *Eldon*, however, yielded with reluctance to this rule, expressing himself dissatisfied with the principle upon which it rests. In one case (e), his lordship, alluding to this subject, says: "The reasoning goes upon this, that a joint and separate action could not be brought at law.

(a) *Ex parte Apsey*, 3 Bro. C. C. 265. *Ex parte Heaton*, Buck, 386.

(b) Co. B. L. 259.

(c) *Ex parte Banks*, 1 Atk. 107.

(d) *Ex parte Rowlandson*, 3 P. Wms. 405. *Ex parte Bond*, 1 Atk. 98. *Ex parte Blankenhagen*, Co. B. L. 259. *Ex parte Hay*, 15 Ves. 4. *Ex parte Masson*, 1 Rose, 159. *Ex parte Liddel*, 2 Rose, 34.

(e) *Ex parte Bevan*, 9 Ves. 225.

But surely the distinction is then, that where a joint and separate bond is given, and another security, several from each; there, as two actions might be brought, the rule in bankruptcy should be different." And upon another occasion (*a*), the same noble and learned lord observed, "In bankruptcy, for some reason not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see why a creditor, having both a joint and several security, should not go against both estates: but it is settled that he must elect." To entitle a creditor to the exercise of this right of election, however, it is necessary he should, in respect of his debt, have a joint claim upon all the partners, if he elect to prove against the joint estate, or a several claim upon the single partner against whose separate estate he may declare his option to prove. Therefore where, by deed, the stock and effects of a partnership were assigned to the continuing partner, who covenanted to pay the joint debts, and the partners afterwards became bankrupts, Sir *John Leach* held that the joint creditors not having, previously to the bankruptcy, accepted the continuing partner as their sole debtor, had not an election to prove against his separate estate. (*b*) So, if a joint creditor take, as a collateral security, a draft from a solvent partner, he may elect whether he will prove against the joint or separate estate; but if he take it in discharge of his joint debt, he must, as it seems, prove against the separate estate. (*c*) Where the right of election is optional, the creditor, in order to make it, must have a reasonable time to inquire into the state of the different funds (*d*), and it seems that he is entitled to defer his election until the assignees are possessed of a fund sufficient to make a dividend. (*e*) In one case where the parties were assignees, and had sufficient funds for a dividend, they were ordered to elect in six weeks. (*g*) But a creditor who has proved against one estate will, in some cases, be allowed to

(*a*) S. C. 10 Ves. 109.

(*b*) *Ex parte* Freeman, Buck, 471. *Ex parte* Fry, 1 Glyn & James. 96. But see Mont. Dig. of New Decis. in Bank. 2d part, p. 71., and 3d part, p. 126, where it is stated that the case *Ex parte* Freeman was overruled by the Lord Chancellor upon appeal.

(*c*) *Ex parte* Roxby, Mont. on Part. 124.

(*d*) *Whistler v. Webster*, 2 Ves. jun. 371.

(*e*) Co. B. L. 259. *Ex parte* Bond, 1 Atk. 98.

(*g*) *Ex parte* Butlin, Co. B. L. 259.



withdraw his proof, and prove against the other (*a*); and although he has received a dividend, the court will permit him to change his proof upon refunding the dividend he received. (*b*) So the petitioning creditor under two commissions, who has proved under one, will be allowed to alter his proof under the other, if he cannot be said to have deliberately elected in the first instance. (*c*) But a creditor having once elected will not be permitted to change his proof, if by so doing he disturb a dividend made under the other estate. (*d*) And, except under special circumstances, a creditor who has proved against one estate will be compelled to retain his proof, if he do not, before a dividend is declared of that estate, signify his election of abandoning it and of proving against the other estate; for otherwise, to the extent of his dividend, he would suspend the division of the property to the prejudice of the other creditors (*e*). So if he prove against the joint estate, and sign the certificates, he cannot, as it seems, vary his proof, and prove against the separate estates. (*g*) And, generally speaking, where the creditor has done acts by virtue of his proof, which may affect the interest of others, he will not be allowed to retract. (*h*) A joint and separate creditor, who sues out a separate commission, and proves his debt under it, is, upon its being superseded in consequence of the awarding of a subsequent joint commission, restored to his right of election to prove against the joint estate and he has also a right to elect out of which estate he will be

(*a*) *Ex parte* Masson, 1 Rose, 159.

(*b*) *Ex parte* Rowlandson, 3 P. Wms. 405.

(*c*) *Ex parte* Bolton, 2 Rose, 389. S. C. Buck, 7.

(*d*) *Ex parte* Beilby, 13 Ves. 70.

(*e*) *Ex parte* Husband, 5 Madd. 419. *Ex parte* Bentley, 2 Cox, 218.

(*g*) *Ex parte* Knott, 1 Mont. B. L. 243. *Ex parte* Atkinson, Mont. Dig. of New Decis. in Bank. 2d part, p. 90. In a late case the Vice-Chancellor seems to have been of opinion that a joint creditor having been a party to a petition was an objection to the transfer of proof. *Ex parte* Husband, 5 Madd. 419.

(*h*) *Ex parte* Solomon, 1 Glyn & James. 25. But see Mont. Dig. of New Decis. in Bank. 3d part, p. 106. n. (*a*). Where a creditor had an election to prove against the joint estate or the separate estate of one partner, with a distinct right to prove against the separate estate of the other partner, and he proved against the joint estate, and, without voting in the choice, was elected an assignee and signed both certificates, it was held that he might transfer to the other separate estate the debt which he had proved against the joint estate, if the deduction of the amount of the debt would not affect the certificate of the other bankrupt, against whom he had proved his distinct separate debt, although the next signature on the certificate may have been influenced by his signature. *Ex parte* Blackburn, Mont. Dig. of New Decis. in Bank. 3d part, p. 127.

paid the cost of the *supersedeas*. (a) But whatever number of securities he may have taken from the bankrupts for the debt, if he elect to go against one estate, and there is a surplus from the estate which he rejects, his securities will give him no preference to the other creditors, but he will be entitled only to share the surplus *pari passu* with them. (b) In a recent case it was held that joint creditors are entitled to prove against the joint estate without giving up securities, or renouncing the separate estate of a deceased partner. (c)

To this *rule of election* there are *exceptions*, which, upon a close examination of the cases, it will be found extremely difficult to reconcile and arrange. In the first place it seems clear, and is admitted by all the authorities, that a creditor will not be put to his election, where the same persons are concerned in several firms, and issue bills drawn by all the partners upon a distinct firm constituted of some of them, and the creditor without notice of their joint connection takes such a bill. Thus, where there was a partnership of four, two of whom were engaged in a separate trade, and the two others in another separate trade, one of these minor firms accepted bills drawn by the other, and the holder, who had *no knowledge* that they were also one firm, was allowed to prove against the respective joint estates. (d) So, where A, B and C were partners in one concern, and A and B in another distinct trade, the holder of a bill drawn by C, and indorsed by A and B, was, on the ground of *his ignorance* of the connection of the three in one partnership, determined to be entitled to prove against the joint estate of A and B, and the separate estate of C. (e) And the recent case of *Ex parte Adam* (g) is to the same effect, viz. five persons in one firm, drawing a bill upon two engaged in a distinct firm, the holder having *no notice* of the connection of the parties. But in one instance the circumstance of the party taking the bill having a knowledge of the joint connection seems to have

(a) *Ex parte Brown*, 1 Ves. & Bea. 60. S. C. 2 Rose, 433. *Ex parte Smith*, 1 Glyn & James. 256.

(b) *Ex parte Bevan*, 10 Ves. 107.

(c) *Ex parte Peacock*, 2 Glyn & James. 27.

(d) *Ex parte La Forest*, Co. B. L. 261.

(e) *Ex parte Benson*, Co. B. L. 263. *In re Burton*, cited 8 Ves. 546.

(g) 2 Rose, 36. S. C. 1 Ves. & Bea. 493. In the latter report the circumstance of the holder being ignorant that the parties were connected in one firm is omitted. See 1 Mont. Dig. 118.

been disregarded, and the holder of a security who had notice that the parties were engaged in one firm was allowed to prove against both estates, although the firms of the parties to the bill were distinct. Thus, where A a sole trader, B and C partners, and D also a sole trader, had engaged in a joint adventure, and for a joint purchase of goods by them, the vendor, *with a knowledge of their joint interest*, received in payment a bill drawn by A on and accepted by B and C, and Lord Eldon held, that on the bankruptcy of A and of B and C, the vendor was entitled to prove the bill against both their estates. (a) Where, however, there are not distinct firms, but one of a partnership has drawn upon the firm, and the holder has taken the security with notice that such person was included in it, he will not be entitled to double proof. Thus, where a creditor *who knew of the general partnership*, but where there was no distinct firm, insisted upon the indorsement of one of them upon a bill drawn by them all, for the purpose of raising a contract for double security, the court thought that he was not entitled to prove. (b) And in the previous case of *ex parte Bigg* (c), which was a bill drawn by A upon a firm which consisted of himself and four others, it was held that the holder, having *had notice* that the drawer was a member of the firm, was not entitled to a double proof. Whether the holder of a bill *without notice* of the fact that the parties liable upon it are not separate firms, but parts of one firm adopting several liabilities upon the instrument, would be put to his election, has not yet been determined; but it may be collected, from the judgment of Lord Eldon in the last cited case, that, in his opinion, the circumstance of the parties to the bill being not distinct firms, would, if it had been necessary to decide the question, have influenced him materially; and therefore it seems, upon the whole, probable that he would be bound to elect. (d)

It was long doubted, whether, if a firm be indebted to one of the partners, the *creditors on the separate estate of that partner* should be admitted as *creditors on the partnership estate*, in competition with the joint creditors; Lord Hardwicke conceived and held (e), that where money had been lent to the partnership

(a) *Ex parte Wenslay*, 2 Ves. & Bea. 254. S. C. 1 Rose, 441.

(b) *Ex parte Bank of England*, 2 Rose, 82.

(c) *Ibid.* 37.

(d) See Eden's, B. L. 174.

(e) *Ex parte Hunter*, 1 Atk. 225.



by a partner, who afterwards became bankrupt, the separate creditors of the latter might prove the amount of the loan, as a debt against the joint estate. Lord *Thurlow*, however, thought differently, and, in a subsequent case (*a*), decided that proof could not, under such circumstances, be made: on the principle that the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners, and that it was a clear and well-established rule that the individual partner could not himself prove against the joint estate in competition with the creditors of the firm, who were in fact his own creditors, and thereby take part of the fund to the prejudice of those who were not only creditors of the partnership, but of himself. Therefore, where there was a joint commission against two partners, and a separate commission against one of them, and the assignees under the separate commission petitioned to be admitted creditors under the joint commission, for a sum of money brought by the bankrupt whom they represented into the partnership beyond his share, and as being therefore a creditor upon the partnership for that sum; Lord *Thurlow* refused it, on the ground that proof of a debt due to an individual partner could not be allowed to come in conflict with the proofs of the joint creditors. (*b*) The rule introduced by Lord *Thurlow* has been in many cases acted upon, and has been confirmed by Lord *Eldon*. (*c*) It was thus concisely stated by his lordship on a recent occasion (*d*): “If one partner lend 1000*l.* to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; that is, no proof can be admitted to affect the creditors; though the individual partners may certainly have the right against each other.” But although in cases, the result of contract, in which the joint is increased at the expense of the separate estate, the funds are administered as they are constituted at the time of the bankruptcy, yet there are circumstances under which the separate creditors will be permitted to prove, against the joint estate, a debt due from the partnership to the individual partner. To induce a relaxation of the rule,

(*a*) *Ex parte* Lodge, Co. B. L. 505. S. C. 1 Ves. jun. 166.

(*b*) *Ex parte* Burrell, Co. B. L. 503. *Ex parte* Parker and *Ex parte* Pine, *ibid.*

(*c*) *Ex parte* Reeve, 9 Ves. 589. *Ex parte* Adams, 1 Rose, 305. *Ex parte* Harris, *ibid.* 438. *Ex parte* Sillitoe, 1 Glyn & James. 382.

(*d*) *Ex parte* Harris, 2 Ves. & Bea. 212.

however, it must be made out that the separate effects, creating the debt, were obtained from the separate to augment the joint estate, either by actual fraud, or under circumstances from which the law will imply fraud: and, in a legal sense, every appropriation by the firm as contradistinguished from a taking either by contract or loan is considered fraudulent, if it be made without the express or implied authority of the individual partner. (a) And where a joint commission issued against A and B, and A being a dormant partner the joint creditors resorted to the separate estate of B, thereby diminishing that separate estate, and exonerating the joint estate of A and B, so as to produce a surplus of it, Lord *Eldon* held that the separate creditors of B had a lien upon that surplus, to the extent which their funds had been diminished by the resort of the joint creditors. (b) A partner in a banking firm, who, after getting his certificate, had taken up the notes of the firm, has been permitted to prove against the joint estate. (c)

Another relaxation of the rule, that a partner cannot prove against a firm, is admitted where there is a *minor partnership* or *house of trade* constituted of *persons* who are *members of a larger firm*, and there are *distinct dealings* between the *distinct houses of trade*, and both firms become bankrupt, the one being indebted to the other in respect of such dealings; in such a case proof may be made for the debt, in the same manner as if the dealings had been among strangers. (d) But the question, what is a dealing in a distinct trade, is always to be looked at with great care, for the proof is admissible on behalf of the separate trade against the aggregate firm only in respect of dealings between trade and trade. If an individual partner, who is a separate trader, lend money to his partnership, the strict rule immediately applies to him, and shuts him out from the benefit of proof; for if it were sufficient to state, in order to bring the case within the exception, that the partner would not have lent the money but as a separate trader, the general rule would be at an end. It is obvious, therefore, that the right of proof must be confined to

(a) *Ex parte Harris*, ante. *Ex parte Yonge*, 3 Ves. & Bea. 31. S. C. 2 Rose, 40. *Ex parte Cust*, Co. B. L. 506.

(b) *Ex parte Reed*, 2 Rose, 84.

(c) *Ex parte Atkins*, Buck, 479.

(d) *Ex parte Hargreaves*, 1 Cox, 440. S. C. cited 6 Ves. 123, 747., and 11 Ves. 414. *Ex parte Ring*, *Ex parte Freeman*, and *Ex parte Johns*, Co. B. L. 509. *Ex parte St. Barbe*, 11 Ves. 413. *Ex parte Hesham*, 1 Rose, 146. *Ex parte Catesby*, 2 Christ. B. L. 286.

distinct dealings in the articles of distinct trades, since a more extended relaxation of the rule would, in its consequences, lead to the destruction of the rule itself. Therefore, where two partners of a larger banking firm carried on a separate trade as ironmongers, and a debt arose from the aggregate firm to the separate trade, in respect of moneys procured for the benefit of the aggregate firm, on the credit of the indorsement of the separate firm, Lord *Eldon* held that no proof could be made on behalf of the firm of the two against the aggregate firm in respect of that debt. (a) And if the firm consist of *two* persons only, and one carry on a separate trade, as they are both liable for the same joint debts, the solvent partner is not entitled to prove, under the commission against his copartner, a debt for goods sold by his distinct house to the firm, until the joint creditors have been satisfied. It would be otherwise in the case of a firm of A, B, C, and D, proving against a firm of A, B, C, and E; for the former would not be liable for the joint debts of the latter firm. (b) So if the concern carried on by one partner is merely a branch of the joint concern, proof will not be permitted. (c). But where some of the members of a partnership carried on different concerns under separate and independent firms, and became mutually indebted the one firm to the other, it was held that proof might be equally made by the one firm against the other. (d)

(a) *Ex parte Sillitoe*, 1 Glyn & James. 374.

(b) *Ex parte Adams*, 1 Rose, 305.

(c) *Ex parte St. Barbe*, 11 Ves. 413.

(d) *Ex parte Castell*, 2 Glyn & James. 124. In Mr. Eden's able Treatise on the Bankrupt Laws, p. 170., it is observed that "the general rule respecting the proof by partners must, it should seem, be considered as limited to the *right of receiving dividends*, upon which it is but justice that a partner, who is himself liable, should not be permitted to take any of the funds before the creditors are paid. But as to the mere right of proof, there is, strange to say, no determination whatever, and we are informed by Mr. Montagu, that the practice of the commissioners is not to permit a partner to prove. 1 Mont. Dig. 245. The reasons which he gives in favour of such proof are, however, so satisfactory, that whenever the point comes to be determined, it should seem that there is no doubt of the right to prove, reserving the right to receive dividends till the taking of the partnership accounts. For 1st, This is an equitable debt, and therefore proveable. 2dly, It may be contended, it is a debt under Sir S. Romilly's act. And 3dly, a partner would be barred by the certificate of his copartner. Mr. Montagu justly adds, that if it is supposed to be unjust that a partner should prove, when by payment by the bankrupt partner, the solvent partner may ultimately be a debtor, instead of a creditor, it is not right to extend this reasoning from cases where the possibility exists, to cases where its existence, as often happens, is impossible."



When a joint commission is taken out, the creditors of the separate estates are not entitled to *interest* upon their debts after the payment of twenty shillings in the pound, unless the joint creditors have received the principal of their debts in full; but the overplus of the separate estates must be applied to increase the joint fund. (a) And if, under a joint commission, both the joint and separate creditors receive the full amount of the principal of their debts, and there is a debt due to the separate estate of one partner from the joint estate, the creditors upon the joint estate will be entitled to interest upon their debts subsequently to the date of the commission, to be paid out of the surplus of the joint estate; upon this principle, that neither the partnership nor the individual partner can claim in competition with the creditors; and if the creditors are entitled to any interest, the interest is as much a debt as the principal: and that principle will prevent either the partnership or the individual debtor ranking with the other creditors, until the whole of their demand is satisfied. (b) It has already been stated that where there is a surplus upon the joint estate, after payment of all the joint creditors, the separate creditors of each partner have a lien upon that surplus, and it must be administered amongst them. (c) And where a man is a partner in separate firms, each of which becomes bankrupt, the surplus of his separate estate will be applied in discharging the joint debts of the firms, in proportion to the whole amount of the debts proved against each firm respectively. (d)

The creditors may agree that the joint and separate estates of the bankrupts shall be blended, and the joint and separate creditors paid *pari passu*, as if they were all creditors of the same class; and if all the creditors of each description are unanimous, the court will order a consolidation of the two estates. But

(a) *Ex parte* Boardman, Co. B. L. 198. S. C. 1 Cox, 275. *Ex parte* Clarke, 4 Ves. 677. *Ex parte* Boyd, 1 Glyn & James. 285. *Ex parte* Minchin, 2 Gl. & Jam. 287. Where, after satisfying both joint and separate creditors, there is a surplus, it is provided by the late general bankrupt act, 6 Geo. 4. c. 16. s. 132. that it shall not be paid over to the bankrupts until, first, interest has been paid on those debts which, either by law or by contract, carry interest; and secondly, until interest, at the rate of four per cent., has been paid upon all other debts proved under the commission.

(b) *Ex parte* Reeve, 9 Ves. 188.

(c) *Ex parte* King, 17 Ves. 115. *In re* Wait, 1 Jac. & Walk. 610.

(d) *Ex parte* Franklyn, Buck, 332. *Ex parte* Bruce, Whitm. B. L. 353. *Ex parte* Barron, *ibid.* 354.

where a meeting of the joint and separate creditors had been called by advertisement, and the creditors present at the meeting had agreed to a consolidation, the court refused, by acting upon their resolution, to bind the interest of the absent creditors of both classes, but directed a reference to the commissioners to inquire if the proposed consolidation was for the general benefit. (a)

Nothing particular occurs with regard to the *certificates*, or their operation, when several are included in the same commission. If they are obtained agreeably to the directions of the statute, they are of course bars against all creditors, whether they have signed or not; but the creditors will not be deprived of their remedy against the bankrupts, if the certificates have been procured by means which the legislature has reprobated. In the case of *Norton v. Shakspeare* (b), a deed of composition, framed only for the joint creditors of two bankrupts, and which was signed by seven joint creditors out of ten, but not by any of the separate creditors of one of the bankrupts, was held not such a "*compounding with his creditors*," as would, within the meaning of the statute 5 Geo. 2. c. 30. s. 9. (c), avoid the effect of a subsequent certificate under a commission of bankrupt, to protect the future estate and effects as well as the person of one of the bankrupts, who was afterwards sued to judgment, and had execution levied on his goods by one of his separate creditors. But if the deed be framed in terms embracing all the creditors, although some of them do not come in, but afterwards sue the bankrupt and obtain payment of their debts, it is such a *compounding with creditors* as will, under the statute, deprive the bankrupt of the benefit of his certificate to protect his future effects. (d) If a commission against partners be superseded as to one or more of them, a certificate subsequently obtained by the partner, as to whom the commission is not ordered to be superseded, is not affected by the *supersedeas*. (e) Where a joint certificate was duly signed by the creditors, and one of the bankrupts died before the commissioners certified their conformity, but the commissioners afterwards certified that the bankrupts

(a) *Ex parte Strutt*, 1 Glyn & James. 29.

(b) 15 East, 619. *Curling v. Oakley*, cited 1 Selw. N. P. (5th ed.) 250. S. P.

(c) See 6 Geo. 4. c. 16. s. 127.

(d) *Slaughter v. Cheyne*, 1 Mau. & Selw. 182.; and see *Reed v. Sowerby*, 3 Mau. & Selw. 78.

(e) 6 Geo. 4. c. 16. s. 16.

had conformed, and that one of the bankrupts died without having made the usual affidavit of conformity; upon the petition of the surviving bankrupt, the Lord Chancellor ordered that the joint certificate should be inserted in the Gazette, as the separate certificate of the petitioner, and that the same should be allowed and confirmed, if no cause should be shown to the contrary, as such separate certificate. (a)

After their certificate has been regularly signed and allowed by the Lord Chancellor, and a final dividend has been made, the bankrupts under joint, as under separate commissions of bankruptcy, are entitled to a decent and reasonable *allowance* out of their effects. (b) Partners, however, under a joint commission, are not entitled to a double allowance, one in respect of the joint, and the other of the separate estate; but one allowance only in respect of their joint and separate effects is to be divided between them, according to the proportions which the surplus of each of their separate estates, after payment of their respective separate debts, and the respective moieties of their joint estate, have contributed to the payment of their joint debts. (c) And in determining the question of allowance the joint and separate estates are not to be considered as distinct, and as if two commissions had issued; but the two estates are to be blended, to consider whether one allowance is to be made. Therefore, a bankrupt under a joint commission was held not to be entitled to an allowance, though his joint estate had paid ten shillings in the pound, unless both joint and separate creditors who had proved had been paid the same dividend. (d) So where, under a separate commission against one partner and the usual order for keeping distinct accounts, the joint estate paid eighteen shillings in the pound, and the separate estate only two shillings in the pound, the bankrupt was held not entitled to an allowance, on the ground that the payment to the joint creditors was not a payment under the bankruptcy, but was a mere mode of arrangement which could not give the bankrupt any other privileges than what he would have been entitled to if his joint property had been

(a) *Ex parte Currie*, 10 Ves. 51. S. P. *Ex parte Cossart*, 1 Glyn & James, 248; and see *Bromley v. Goodere*, 1 Atk. 77.

(b) See 6 Geo. 4. c. 16. s. 128.

(c) *Ex parte Bate*, 1 Bro. C. C. 453. S. C. Co. B. L. 488.

(d) *Ex parte Powell*, 1 Madd. 68. See also *Ex parte Stiles*, 1 Atk. 208.



distributed under the direction of a court of equity. (a) And a bankrupt who pays twenty shillings in the pound, under a separate commission to his separate creditors, is not entitled to an allowance against the right which the joint creditors have to the surplus under the usual order. (b) With respect to the allowance under a joint commission, it was formerly considered that it could only be claimed jointly; and, therefore, that if one partner solely obtained his certificate he was not entitled to it, so long as his copartner remained uncertificated. (c) This, however, has subsequently been remedied by a legislative provision (d), which declares, that "in all joint commissions, under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance." And in the construction of this act it has been held, that where the separate estate of one of three partners had paid twenty shillings, and the surplus carried to the joint estate, on which twelve shillings and sixpence had been paid, he was entitled to his sole use to the allowance, although upon the separate estates of the other partners a sufficient dividend had not been paid, the new act showing the legislature to have contemplated the separate payment of each partner's allowance; but such allowance is not payable until the final dividend is made. (e)

Sometimes it happens that one partner only commits an act of bankruptcy, while the others remain perfectly solvent; in which case, a *separate commission* can alone be supported against the party committing the act of bankruptcy.

As to the *trading and act of bankruptcy* requisite to ground a separate commission, it can make no difference whether a person carries on business with others or by himself. With respect to the petitioning creditor's debt, it was questioned in a case, in which the point was most elaborately discussed (g), whether a

(a) *Ex parte Farlow*, 2 Ves. & Bea. 209. S. C. 1 Rose, 421. *Ex parte Terrell*, Buck, 345.

(b) *Ex parte Holmes*, 3 Ves. & Bea. 137. S. C. 2 Rose, 95.

(c) *Ex parte Powell*, 1 Madd. 62.

(d) 6 Geo. 4. c. 16. s. 129.

(e) *Ex parte Minchin*, 1 Mont. & M. 135.; and see *Ex parte Goodall*, 2 Glynn & James. 281.

(g) *Crisp v. Perrit*, Willes, 467. S. C. 1 Atk. 153.

joint debt due from all the partners would support a separate commission against one of them; and on the principle that a joint creditor might at law proceed by execution against separate estate, the question was then settled in the affirmative, and is now indisputable. (a) But a debt due from one partner to another, where the accounts have not been balanced and adjusted, is not a sufficient foundation for a commission; although Lord *Eldon* thought that had the partnership been determined, and had the solvent partner paid all the debts, a commission might have been supported. (b) And in a late case where the petitioning creditors had all been in copartnership with the bankrupt in a contract to supply provisions for the use of the navy, and the affairs of the contract had not been settled, Lord *Ellenborough* intimated that if the debt of the petitioning creditors arose out of the partnership concerns, it was insufficient. (c) But where the proprietor of goods intrusted them to a trader to sell, upon an agreement that after deducting the cost price of the goods, the interest of money, and all charges, the profits should be equally divided, and after a sale and appropriation of the profits the trader was indebted to the proprietor in more than one hundred pounds, it was ruled that this was a good petitioning creditor's debt. (d)

A *separate commission* against one partner followed by an adjudication that he is a bankrupt, *puts an end to the partnership*; and the share or interest of the bankrupt partner in the partnership effects, upon the execution of the assignment by the commissioners, vests in his assignees. The effect of the bankruptcy is to dissolve the partnership, and to avoid all the acts of the bankrupt from the day of the bankruptcy. It severs the joint-tenancy; and the assignees of the bankrupt partner become tenants in common with the solvent partner in the partnership effects, subject to all the rights of the latter (e), but according to the doctrine of

(a) *Ex parte* Elton, 3 Ves. 239. *Ex parte* Chandler, 9 Ves. 35. *Ex parte* Ackerman, 14 Ves. 604. *Ex parte* Dewdney, 15 Ves. 499. *Ex parte* Lavender, 18 Ves. 19.

(b) *Ex parte* Nokes, 1 Mont. B. L. 21, 605. See also *West v. Skip*, 1 Ves. sen. 239. S. C. 2 Swanst. 586. *Ex parte* Maberley, Mont. on Part. p. 63. in notes.

(c) *Windham v. Paterson*, 1 Stark. N. P. C. 144.

(d) *Marson v. Barber*, Gow's N. P. C. 17.

(e) *Fox v. Hanbury*, Cowp. 448. *Hague v. Rolleston*, 4 Burr. 2174. *Ex parte* Smith, 5 Ves. 295. It has been ruled by Lord Ch. J. *Holt*, that if there be four

courts of equity, perhaps, with equities in them vastly beyond what tenants in common have where no bankruptcy has occurred. (a) We will in the first place consider the effect of an assignment under a separate commission, and what property passes by it to the assignees.

A separate commission being a statute execution against both separate and joint estate, the *assignees take* under it all the *separate property of the bankrupt*, and all his *interest in the joint property* (b); the extent of which interest is exactly the same as that which vests in a separate creditor of one partner by a judgment at law, taking execution against the partnership effects. The interest of the solvent partner is not affected by the execution in the one instance (c), nor by the bankruptcy in the other. (d) In the case of an execution, the sheriff, though he may seize the whole of the joint property, can sell only an undivided moiety; and the vendee becomes, *quoad* the interest of the indebted partner, tenant in common with the solvent partner, taking only the *undivided* share of the debtor, subject to all the rights of the other, and to the account to be taken between them as partners. So, in the case of bankruptcy, the assignees under

partners, whereof three are bankrupts, and their shares assigned, and a payment is made to him that was no bankrupt, it is a payment to all the assignees; for now they are all partners. *Anon.* 12 Mod. 447.

(a) *Per* Lord Eldon, *Barker v. Goodair*, 11 Ves. 85. Assignees under a separate commission of bankruptcy against one partner, cannot, without the consent of every person interested in the estate, engage in any new adventure with the solvent partner. 15 Ves. 228.

(b) *Ex parte* Cobham, 1 Bro. C. C. 576. *Ex parte* Hodgson, 2 Bro. C. C. 5. *Horsey's case*, 3 P. Wms. 23. *Bolton v. Puller*, 1 Bos. & Pul. 539. *Ex parte* Bamed, 1 Glyn & James. 311.

(c) *Heydon v. Heydon*, 1 Salk. 392.

(d) *Taylor v. Fields*, 4 Ves. 396. S. C. 15 Ves. 559. n. In the case of *Barker v. Goodair*, 11 Ves. 85., Lord Eldon, after alluding to the question whether a separate creditor, taking a moiety of a chattel in execution, may call for a sale of it and divide the money, or whether a court of equity would not force upon him the whole account of the partnership, permitting him only to take that interest which the partner, his debtor, would have been entitled to after the account, adds, "but we have gone much greater lengths in bankruptcy as to that, and even in the absence of the other partner. In bankruptcy, after one partner has become bankrupt, I do not recollect that a joint creditor was ever permitted to bring an action, and by an execution fasten upon a moiety of the effects. On the contrary, in the absence of the solvent partner, we say, the assignees shall take the solvent property, and deal with it as the partner himself ought to have dealt with it, paying all the joint creditors equally as far as the joint property goes, and applying the surplus under all the equities subsisting between the partners." See also *Dutton v. Morrison*, 17 Ves. 209.



a separate commission can affect the joint property no farther than the bankrupt himself; they have no right to change the possession, or to make any specific division of the effects; they take only such undivided share or interest as the bankrupt himself had, and in the same manner as he held it, that is, subject to all the rights and liens of the other partner, and they are entitled only to that balance which is ascertained to be due to the bankrupt, after the partnership debts and the claims of the solvent partner are satisfied, and a division is made of the surplus. (a) But, whatever his interest is, the assignees are entitled to it specifically, and no agreement made between the partners themselves, in contemplation of bankruptcy, can prevent their right from attaching. Thus in a late case (b) it appeared, that articles of partnership had provided, that on a dissolution by the death, notice, or misconduct of a partner, the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years; and that, on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; but by a deed, executed four years subsequently, the partners declared, after a recital that such was their intention in the articles, that in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct; one of the partners having become bankrupt within a few months after the execution of the latter deed, it was held, that his assignees were not bound by it. Had such a provision been contained in the original articles of partnership, it seems doubtful whether it would not have been void, as being contrary to the policy of the bankrupt laws. For, although the owner of property may, on alienation, qualify the interest of his alienee, by a condition to take effect on bankruptcy, yet it seems that he cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi* which, for the first purpose, is absolute, being in the latter instance subject to the disposition previously prescribed by law. (c)

(a) In *Holderness v. Shackels*, 8 B. & C. 618. Lord *Tenterden* observed that it is clearly established as a general principle of law, that if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects, unless they first satisfy all that is due from him to the partnership.

(b) *Wilson v. Greenwood*, 1 Swanst. 471. S. C. 1 J. Wilson, 223.

(c) See 1 Swanst. 481. n.

And if one partner advance part of his share of the expense of an adventure, and give his notes for the remainder, which do not become due until after he is declared a bankrupt, the assignees are entitled to his full share of the profits of the adventure, notwithstanding the holders of the notes receive only a dividend under the commission; and the solvent partners cannot, by voluntarily discharging the notes, stand in the place of the bankrupt, for any proportion of the profits to which he would have been entitled. (a) So, if one partner mortgages all his interest in the partnership stock to the other members of the firm, or to a person in trust for them, and afterwards, and until he becomes bankrupt, continues to act as a partner, without delivering exclusive possession of the stock to the mortgagee, the share so mortgaged is distributable under the commission, as the separate property of the bankrupt. (b) And where two persons, on entering into partnership, agreed that the manufactory and utensils in trade should be the separate property of one of them, and that the other should pay a rent in proportion to his share of the business, and the manufactory and utensils being insured in the name of the true owner, they were subsequently consumed by fire, and afterwards a commission of bankruptcy issued against both, it was held that the insurance money formed part of the separate estate of the assured, and was unaffected by the statute. (c) We have already explained (d), that where a firm consists of a dormant and an ostensible partner, and the latter becomes bankrupt, the whole joint property will pass as his separate estate under the statute of *James*, and of course that it will so pass under the late general bankrupt act, in which the provisions of the former statute have been embodied. (e) This, in some instances, bears hard upon the dormant partner, who may be called upon to pay the partnership debts, at the same time that he is deprived of all the partnership property acquired by the contracting those debts; but as the world naturally gives credit to the ostensible partner on his reputed property, and as the statute was particularly directed to remedy the mischief arising from a

(a) *Smith v. De Silva*, Cowp. 469. See the observations of Lord *Tenterden* on this case, in *Holderness v. Shackels*, 8 B. & C. 618.

(b) *Ryall v. Rowles*, 1 Ves. sen. 348. S. C. 1 Atk. 165. 1 Wils. 260. *Hall v. Gurney*, Co. B. L. 333. *Ex parte Standgroom*, *ibid.* 337. S. C. 2 Cox, 234.

(c) *Ex parte Smith*, 3 Madd. 63. S. C. Buck, 149.

(d) See *ante*, p. 278.

(e) See the 6 Geo. 4, c. 16, s. 72.

trader's holding out a delusive responsibility, it follows that the person who permits him to exhibit that false appearance should be answerable for the consequences. And with respect to the two classes of creditors, no injustice or inconvenience will, generally speaking, result to them. The separate creditors, who trusted the ostensible partner on the faith of his apparent ownership of the property, have the primary claim to it, and justly so, for otherwise there might not be any fund to which they could resort for payment; whilst the joint creditors will be entitled to any surplus that may remain after satisfying the separate creditors, and will also have their remedy against the dormant partner for the whole or any part of the partnership debts. Where a sole trader agreed, in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, and, after they were admitted, the firm became bankrupt whilst some of the instalments remained unpaid, it was determined that, unless the bargain was *ab initio* a mere fraud, the instalments must be paid as they became due: for, upon admission, the whole price became *debitum in præsentī*, although *solvendum in futuro*. In equity, as well as at law, such a contract is performed, on one side, by admission; and the consideration must be paid by the other side. The loss is not a breach of contract, but a contingency, subject to which the party purchased: and if no provision was made for such an event by the agreement, equity can give no relief. It might be otherwise if the party had been drawn into the bargain by fraud and misrepresentation (*a*): for though, even in such fraudulent case, the injured party could not be allowed to prove in competition with the creditors of the firm, in respect of the instalments actually paid (*b*); yet payment of the future instalments could not be enforced. (*c*) If, after an act of bankruptcy committed by one partner, the solvent partners continue to trade with the joint capital, they must account to the assignees for the bankrupt's share of the profits derived from such trading. (*d*) And on this principle, upon an exception to a master's report, stating the capital and stock in trade of a partnership to consist, at the time of the bankruptcy of one of the partners, of the estimated value of the dead stock employed in it,

(*a*) *Akhurst v. Jackson*, 1 Swanst. 85. S. C. 1 J. Wils. 57.

(*b*) *Ex parte Broome*, 1 Rose, 69.

(*c*) *Hamel v. Stokes*, 4 Price, 166. S. C. 1 Daniel, 20.

(*d*) *Crawshay v. Collins*, 15 Ves. 218.



it was referred back to him to state what was the amount of the capital, and also of the stock in trade at that time, in order to adjust the amount of subsequent profits to which the assignees of the bankrupt partner were entitled, as against the other partners, who continued to trade with the partnership property after the bankruptcy. (a) But where by contract, custom, or previous usage between partners, in particular adventures, the share of each is subject to the lien of the other partners, for his proportion of the outfit and of the expense, no partner, or representative of a partner, has a right to his aliquot part of the subject-matter of the adventure, until he has paid his share of the expense of procuring it; and, consequently, if one becomes bankrupt without having paid such share, his assignees cannot recover from the other partners his proportion, without a previous tender of the amount of such share. Thus, in a recent case, it appeared, that A, B, and C, together with others, were part owners of a ship engaged in the whale fishery. The usual mode of managing the cargo was, that on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of B and sold by him, and the proceeds were applied towards the discharge of the expenses of the ship. The blubber was deposited in a warehouse rented of C, by the owners of the ship, and the oil produced from it was then put into casks, each owner's share being weighed out, and placed separately in the warehouse, in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid; and, in that case, the warehouseman used to detain the oil till the ship's husband's demand had been satisfied. The ship having arrived from her voyage in 1825, the above course was followed. The share weighed out and set apart for C was twenty nine tons, which was stowed in the warehouse in casks, which had A's initials put on them. In *January* 1826, A became bankrupt. Twenty tons of the oil had been delivered to him before his

(a) S. C. 1 Jac. & Walk. 267. Where the stock, at the time of the bankruptcy of one of the partners, consisted partly of patents, the benefit of which were continued by the solvent partners, the court held, under the circumstances, that the assignees were entitled to share in the profits after the bankruptcy, until the final settlement and account, allowances being made for advances of capital subsequently brought in by the solvent partners. S. C. 2 Russ. 325.

bankruptcy; the remaining nine tons remained in the warehouse at that time. In the same month the warehouseman had orders from C, the ship's husband, not to deliver to A the remaining oil, as his share of the disbursements of the ship had not been paid: and it was held, in an action of trover brought by the assignees of A against C for the residue of A's oil, that the other part-owners had originally a lien on it for his share of the disbursements of the ship, and that this right was not divested by the separation of A's share from the residue, and placing it in casks marked with his name. (a)

If a customer agree to pay into a bank composed of four partners, bills of exchange indorsed, and to take in return their promissory notes, the relation of debtor and creditor is, by the contract, created with respect to all bills paid into the bank, and notes taken in return, so long as the firm continues the same as when the agreement was entered into: and if the whole of the partners become bankrupt, no lien can be claimed upon the bills paid in before the bankruptcy; such bills will be held to have been paid in for the purpose of being discounted, and the property in them to have become vested in the bankers (b): but if one or more of the partners become bankrupt, and subsequently bills are paid in, this transaction cannot be referred to a contract made in contemplation of the security of the whole four original partners. When the customer receives promissory notes, purporting to be the security of the four, but which, in truth, are the security of fewer than the whole number, he does not receive the consideration he contracted for, and his bills were delivered to persons to whom his contract did not apply: should they, therefore, also become bankrupts, their assignees cannot retain the bills so paid in; the promissory notes, however, given in return for the bills, must, of course, be restored. (c) But if, by construction of a written document to that effect, an agreement can be fairly inferred, that, notwithstanding the change of firm, the contract made with the original firm shall be continued, the depositor of bills with the new firm can have no relief. (d)

We have seen in a former part of this work (e), that an *act*

(a) *Holderness v. Shackels*, 8 B. & C. 612.

(b) *Ex parte M'Gae*, 2 Rose, 377. note.

(c) *Ex parte M'Gae*, 19 Ves. 609. *Ex parte Rowton*, 17 Ves. 451.

(d) *Ex parte Marsh*, 2 Rose, 243.

(e) See *ante*, p. 227.

of bankruptcy committed by *one partner*, when followed by a commission, *dissolves the partnership* by relation to the time when the act of bankruptcy was committed. The partner, therefore, who has committed the act of bankruptcy, cannot afterwards communicate to strangers any rights either against the firm or the joint property; because the commission and assignment retrospectively deprive him of all capacity of acting; they determine his power to bind the firm by relation to the date of his bankruptcy, and all his rights, from that time, passing to his assignees, he ceases to have any further control over the partnership, or the joint property. And the statutes concerning bankrupts make an entire, not a partial avoidance of the bankrupt's acts, as well in respect of his partner's moiety as his own. Therefore, where a partner, on the eve of his bankruptcy, voluntarily deposited goods with a third person for a creditor of the firm, and the deposit falsely purported to be founded upon a supposed sale; the creditor, after the bankruptcy of the partner, having received information of the deposit, declared his acceptance of it; and in an action of trover by the assignees under a joint commission to recover the goods, it was held that the creditor could not resist their claim, inasmuch as the deposit was not completed until after the bankruptcy of the party depositing, at which time the partnership was at an end. (a) So, where two of three partners affecting, but without authority, to bind the firm, by deed assigned a debt due to them from a correspondent abroad, without his privity, to a creditor at home, and afterwards, by the direction of such correspondent, drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order, for the amount of the debt; and then the two partners, having in the mean time committed acts of bankruptcy, indorsed such bill to the creditor of the firm in part satisfaction of his debt, and afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned, the other partner being all the time abroad. It was held that by such indorsement of the bill by the two, after acts of bankruptcy committed by them, though, before the commission issued, nothing passed to the creditor; for the bankrupt partners had, by relation, ceased, at the time of such indorse-

(a) *Hague v. Rolleston*, 4 Burr. 2176.



ment, to have any control over the joint stock as partners, and therefore could not bind either the property of their assignees, or of their solvent partner. (a) But the acts of a solvent partner, in disposing of the property in the course of trade, after a secret act of bankruptcy committed by his copartner, are valid. Therefore, upon a question, whether assignees under a joint commission against two partners taken out after the bankruptcy of both, could maintain an action of trover, against a person in possession of goods under a sale or consignment, *bonâ fide*, for a valuable consideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himself, but after an act of bankruptcy committed by the other partner; the court held the action could not be maintained, because the act of the partner, who, at the time of the consignment, had not committed any act of bankruptcy, bound both, and also because, supposing the consignment avoided by the act of bankruptcy of the other partner, then it was an action of trover, by one tenant in common against another, which clearly was not sustainable. (b) And the same rule holds, although the solvent partner knew of the bankruptcy; for even in such case, the solvent partner, having a lien on the partnership funds for his own indemnity, limited to their being applied to the payment of partnership debts, may dispose of partnership property in discharge of a debt due from the partnership; and though he afterwards become bankrupt, an action for money had and received will not lie against the creditor at the suit of the joint assignees. Thus, where one of two partners, who were country bankers, became bankrupt, and the defendants being holders of their notes, obtained payment of part of them from the *London* bankers, at whose house they were payable, out of the funds in their hands, belonging to the country bank, and the solvent partner, knowing of the bankruptcy, procured a debtor to the firm to give his bill in part satisfaction of his debt, and indorsed and delivered the same to the defendants, in payment of

(a) *Thomason v. Frere*, 10 East, 418.

(b) *Fox v. Hanbury*, Cowp. 448.; and see *Anon.* 12 Mod. 446. *Smith v. Stokes*, 1 East, 364. *Smith v. Oriel*, *ibid.* 369.; and the judgment of Lord Chief Baron Thompson in *Coldwell v. Gregory*, 1 Price, 129. In *Brickwood v. Miller*, 3 Meriv. 282., Sir William Grant is reported to have said, that it is perhaps a matter of some uncertainty to what extent the bankruptcy of one partner affects the power of the others over the partnership property.

the residue of the notes in their hands, and afterwards became bankrupt; it was held, that the assignees could not recover from the defendants the monies so paid to them by the *London* bankers, nor the proceeds of the said bill. (a) But it has been ruled that, after a secret act of bankruptcy committed by one of two partners, the other cannot, by an indorsement in the name of the firm, transfer the property in a bill, which belonged to the firm before the bankruptcy; for the partnership having ceased to exist, the solvent partner is to be considered as tenant in common with the assignees of the bankrupt partner, and consequently the property in a bill can only be transferred by their respective indorsements. (b) And it is stated to have been held, on a motion for a new trial, that a disposition by the solvent partners of a partnership security, after the bankruptcy of an individual member of the firm, is not available in favour of a creditor who, at the time of such disposition, was privy to the bankruptcy; because the right of the creditor to retain the security under such circumstances is in direct contravention with the principles of the bankrupt laws, which subject the partnership property, as it existed at the time of the bankruptcy, to the claims of the creditors of the single bankrupt. (c) It has been intimated that where acts of bankruptcy are committed by partners at distinct times, and, between the two acts, the then solvent partner pays a debt to a joint creditor, the joint assignees may, in an action for money had and received to their use, as assignees of the partner who, at the time of the payment, had committed the act of bankruptcy, recover a moiety. (d) But it seems difficult to conceive upon what principle a partner is to be considered as entitled to a moiety of each article or sum belonging to the partnership, until the accounts are taken; and the more especially so in a case in which the right of the creditor stands upon the legal effect of partnership, by which a partner may make a valid transfer to a third person, without subjecting the validity of such transfer to depend upon the claims between the partners themselves. A partner whose interest is confined to the profits, and does not extend

(a) *Harvey v. Crickett*, 5 Mau. & Selw. 336.

(b) *Ramsbottom v. Lewis*, 1 Campb. 279.; and see *Ramsbotham v. Cator*, 1 Stark. N. P. C. 228.

(c) *Ramsbottom v. Duck*, 1 Mont. Dig. of New Decis, p. 18. of the notes.

(d) *Smith v. Goddard*, 3 Bos. & Pul. 465. *Whitwell v. Thompson*, 1 Esp, N. P. C. 68. 72. But see the judgment of *Holroyd J.*, in *Harvey v. Crickett*, *supra*, *semb. contra*.

to the capital, cannot, after the bankruptcy of the real owner, transfer the property, so as to render the transfer effectual against the assignees. (a) And upon the principle that a separate commission against one partner severs the joint-tenancy, and vests the bankrupt's share of the partnership effects in his assignees as tenants in common with the solvent partner, by relation to the time of the act of bankruptcy, an injunction has been granted against proceeding under a *foreign attachment* in the Lord Mayor's Court against the property of two partners, where a commission had been sued out against one of them, overreaching the attachment by relation to the date of the bankruptcy. (b) But where the commercial establishment is carried on both in this and in a distant country, not subject to the bankrupt laws, a creditor of the firm who, after an act of bankruptcy committed by a partner resident here, attaches the joint property abroad, cannot be compelled to refund what he so obtains by legal process; for the court cannot reach the property abroad, or bind the partners who are out of its jurisdiction; and whenever it takes from the creditor his separate remedy, it professes, at least, to give him his distributive share of the whole partnership property. Therefore, where a partnership was formed in the *West Indies*, and one of the partners came to *England*, and established himself in *London* for the purpose of conducting the *English* branch of the business, and he received and disposed of the consignments from the *West Indies*, and shipped cargoes from *England* to his partners there, and after an act of bankruptcy committed by him, a joint creditor attached in the *West Indies* property belonging to the firm; it was held that the assignees under a separate commission against that partner could not compel the attaching creditor to refund the property which he had attached, or to account for what he had received by virtue of his attachment. (c) And the same rule which governs the case of an attachment against joint property within the reach of the court must apply with equal force to an execution against joint estate similarly situated. Therefore, where after an execution issued at the instance of

(a) *Meyer v. Sharpe*, 5 Taunt. 74.

(b) *Barker v. Goodair*, 11 Ves. 78. *Dutton v. Morrison*, 17 Ves. 193. S. C. 1 Rose, 213. In *Bristow v. Potts*, 11 Ves. 81, in note, Lord *Rosslyn* held a different opinion, as he decided that the assignees of one of the joint debtors had no equity to obtain an injunction against creditors who had attached the joint estate.

(c) *Brickwood v. Miller*, 3 Meriv. 279.



joint creditors against joint effects, a commission of bankruptcy was sued out by another joint creditor against one of the partners upon an act of bankruptcy antecedent to the execution executed, it was determined that the creditors who had taken the effects by virtue of the execution could not retain them against the assignees under the separate commission. (a) Where one of two solicitors in partnership had become bankrupts, the Court of Chancery refused to compel the assignees to deliver over a client's papers to the other, without the client's consent. (b)

It has been said (c), that if joint property be in the possession of a bankrupt partner at the time of the bankruptcy, the assignees may take the whole property and sell it, but they must account to the other partner for his share. In a recent case, however, where, under a separate commission against one partner, the assignees took possession of the partnership property, and were about to sell it, the Vice-Chancellor, on the application of the solvent partner, granted an injunction, restraining the sale, although the bill contained no offer to pay the joint creditors, but merely proposed to account for the share of the bankrupt. (d) But, under a separate commission, if all the joint property is seized by the assignees, and the solvent partner is dead, the assignees may, by a bill in equity, be compelled to divide not only a moiety, but the whole of the joint effects amongst the joint creditors (e); and if the solvent partner is abroad, the whole estate is administered in bankruptcy. (g) Under a separate commission, the separate estate is entitled to be reimbursed out of the joint estate expenses incurred in recovering property for the benefit of the joint creditors. (h)

(a) *In re Wait*, 1 Jac. & Walk. 605. ; and see *Dutton v. Morrison*, 17 Ves. 193.

(b) *Davidson v. Napier*, 1 Sim. 247. ; and see *Ex parte Horsfall*, 7 B. & C. 528.

(c) *Per Lord Kenyon*, *Smith v. Stokes*, 1 East, 369.

(d) *Allen v. Kilbree*, 4 Madd. 464. It is difficult to reconcile this decision with the observations of Lord Eldon in *Barker v. Goodair*, 11 Ves. 85., and *Dutton v. Morrison*, 17 Ves. 209. But the court will not, on the application of joint creditors, restrain the assignees, under a joint commission, from a sale of the stock in trade of the bankrupt partners ; because, in proceeding to such sale, the assignees act at their own risk, and upon their own responsibility, and they and not the court are to be judges of the propriety and expediency of it. *Ex parte Montgomery*, 1 Glyn & James. 338. See *Ex parte Figs*, *ibid.* 122.

(e) *Hankey v. Garrett*, 1 Ves. jun. 236. S. C. 3 Bro. C. C. 457. *Everett v. Backhouse*, 10 Ves. 98. The practice is to obtain this arrangement by order upon petition after the choice of assignees. Co. B. L. 256. 1 Mont. B. L. 330.

(g) *Per Lord Eldon*, *Barker v. Goodair*, 11 Ves. 86.

(h) *Ex parte Rutherford*, 1 Rose, 201.

Before the passing of a late act of parliament, it was an established rule that *joint creditors* should not be permitted to vote or interfere in the *choice of assignees* under a separate commission. (*a*) The electors of the assignees were the separate creditors, and the petitioning creditor, whether joint or separate (*b*); but if there were not any separate creditors, the amount of whose debts would entitle them to vote (*c*), or if there were not any joint estate (*d*) or a solvent partner (*e*), the joint creditors would have been entitled to have proved their debts for this purpose. And even where joint creditors were excluded from voting, the court would in some cases, where they were unrepresented, have appointed a person as an agent or inspector of the joint estate with ample authority to take care of their interests. (*g*) But now by the 6 Geo. 4. c.16. s.62., it is enacted, "that in all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt or bankrupts is or are indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission, for the purpose only of voting in the choice of assignees under such commission, and of assenting to or dissenting from the certificate of such bankrupt or bankrupts, or of either of such purposes."

Where the assignees under a separate commission possess themselves of the joint property, it may frequently be to the interest of joint creditors that *distinct accounts* should be kept of the *joint and separate estates*, and that each should be applied to the payment of the respective classes of creditors according to the

(*a*) *Ex parte* Alcock, 11 Ves. 603. *Ex parte* Hubbard, 13 Ves. 424. *Ex parte* Longman, 18 Ves. 71. *Ex parte* Taylor, 18 Ves. 284. *Ex parte* Parr, 18 Ves. 70. S. C. 1 Rose, 76. *Ex parte* Simpson, 1 Meriv. 38. S. C. 2 Rose, 337.

(*b*) *Ex parte* Hall, 9 Ves. 349. *Ex parte* Ackerman, 14 Ves. 604. *Ex parte* Dewdney, 15 Ves. 499.

(*c*) *Ex parte* Jones, 18 Ves. 283. S. C. reported *nom.* *Ex parte* Laycock, 1 Rose, 32.

(*d*) *Ex parte* Pinkerton, 6 Ves. 814. n. *Ex parte* Machell, 2 Ves. & Bea. 216. S. C. 1 Rose, 447.

(*e*) *Ex parte* Janson, 3 Madd. 229. S. C. Buck, 227.

(*g*) *Ex parte* Bassaro, 1 Rose, 226. *Ex parte* De Tastet and *Ex parte* Martell, ib. 324, 5. S. C. 1 Ves. & Bea. 280. *Ex parte* Mills, 3 Ves. & Bea. 139. S. C. 2 Rose, 68. *Ex parte* Simpson, 1 Meriv. 38. S. C. 2 Rose, 337. Where, under a separate commission, a solicitor was appointed by the assignees, and the joint creditors employed another solicitor for the benefit of the joint estate, it was held that they were not entitled to have the expenses thereby incurred paid out of the joint estate. *Ex parte* Longman, 1 Rose, 303.

customary mode of applying the different estates, when separate creditors prove under a joint commission. The correct mode of effecting this arrangement is by bill, but the practice is to obtain the order by petition after the choice of assignees. (a) And where, under a separate commission against one of two partners, the usual order was obtained for keeping distinct accounts of the joint and separate estate, the bankrupt having paid 20s. in the pound to all his creditors, obtained an order for the payment of the surplus to him, and the same was accordingly paid. The representative of the other partner was served with the petition, and by mistake had omitted to appear. Upon her petition it was held, that she was entitled to apply by *petition in bankruptcy* for an account of such surplus, and for payment of her proportion of it, and that the court had jurisdiction to make the order. (b) Where two separate commissions are taken out against different members of a firm, it has been said that there ought not to be orders for keeping distinct accounts under each commission. (c)

We will now consider the right which the *joint creditors have of proving their debts, with a view to receiving dividends*, under a separate commission issued against one of their debtors. (d) Where the separate commission issues at the instance and on the petition of a joint creditor (e), his right is in no respect distinguishable from that of a separate creditor. He is entitled to prove his debt under the commission as if it were a separate debt, and to receive a dividend *pari passu* with the separate creditors. It is not even an objection to his proof that as to part of the debt

(a) 1 Mont. B. L. 330., and Co. B. L. 253.

(b) *Ex parte Lanfear*, 1 Rose, 442. It was urged that the application should have been by bill.

(c) *Per Lord Eldon, Ex parte Bolton*, Buck, 7.

(d) In *Heath v. Hall*, 4 Taunt. 328. *Mansfield C. J.* says, "The practice of the Court of Chancery has varied much within my memory; it used to be that a joint creditor might, under a separate commission, prove and receive a dividend; but now he cannot proceed to receive a dividend unless there is a surplus; he can only prove his debt."

(e) *Ex parte Hall*, 9 Ves. 349. *Ex parte Ackerman*, 14 Ves. 634. *Ex parte Dewdney*, 15 Ves. 499. The petitioning creditor under a joint commission cannot sustain a claim of proof against the separate estates of the bankrupts, in competition with the separate creditors. And therefore, where a joint creditor sued out a commission against A "as surviving partner of B," it was held, that as the assignees under it were entitled to possess the joint estate, and to administer it as joint estate, and as a separate creditor could not have maintained such a commission, the commission was joint, and consequently that the creditor could claim only against the joint estate. *Ex parte Barned*, 1 Glyn & James, 309.



proved he is a trustee for another joint creditor, who, according to the general rule, could not himself have proved, so as to have been entitled to receive a dividend, because with the trust the commissioners or creditors have no right to interfere. (a) But in determining the rights of the other joint creditors under a separate commission, great uncertainty and confusion has prevailed. In the time of Lord *Hardwicke*, the rule adopted was to permit joint creditors to prove under a separate commission against one partner, or under separate commissions against all the partners, for the purpose of assenting to or dissenting from the certificate; and the joint creditors were considered to have an equitable right to any surplus of the separate estates, after payment of the separate creditors; but the joint property was distributed under a joint commission taken out for that purpose, or a bill must have been filed for an account of the joint estate. (b) This rule was broken in upon by Lord *Thurlow*, who expressed his decided opinion that the contrary course was the best, as being the most legal, and who, in several instances (c), allowed the joint creditors to prove and take dividends under a separate commission; his lordship holding that a commission of bankruptcy was an execution for all the creditors, and as the assignees under a separate commission might possess themselves, not only of the separate estate, but of the bankrupt's proportion of the joint estate, and as a joint creditor having brought an action and recovered judgment against all his debtors might have several executions against each, therefore the bankruptcy preventing his action with effect, should be considered a judgment for him as well as the others, and consequently that no distinction ought to be made between joint or separate debts, but that they ought all to be paid rateably out of the bankrupt's property, which was composed of his separate estate, and his moiety or other proportion of the joint estate. (d)

(a) *Ex parte De Tastet*, 17 Ves. 247. S. C. 1 Rose, 10. The petitioning creditor under a commission against two or more partners of a firm is not entitled to receive a dividend out of the separate estates rateably with the separate creditors. 6 Geo. 4. c. 16. s. 62.

(b) *Ex parte Baudier*, 1 Atk. 98. *Ex parte Voguel*, 1 Atk. 132. *Ex parte Oldknow*, Co. B. L. 245. *Ex parte Cobham*, ib. 246. See also *Dutton v. Morrison*, 17 Ves. 207. *Ex parte Farlow*, 1 Rose, 422.

(c) *Ex parte Haydon*, Co. B. L. 246. S. C. 1 Bro. C. C. 453. *Ex parte Copland*, Co. B. L. 248. S. C. 1 Cox, 420. *Ex parte Hodgson*, 2 Bro. C. C. 5. *Ex parte Page*, ib. 119. *Ex parte Flintum*, ib. 120.

(d) See *Dutton v. Morrison*, 17 Ves. 207.

Lord *Rosslyn* acted for some time upon the practice established by Lord *Thurlow*, but afterwards with some alteration; and upon great consideration, he restored the principle of the rule which had been adopted by Lord *Hardwicke*. In the case of *Ex parte Elton* (a), Lord *Rosslyn* says, "The plain rule of distribution is, that each estate shall bear its own debts. The equity is so plain that it is of course upon a bill filed. The object of a commission is to distribute the effects with the least expense. Every order I make to prove a joint debt upon the separate estate, must produce a bill in equity. It is not fundamentally a just distribution, nor a convenient distribution; because it tends to more litigation and more expense. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance; it is a contrivance to throw this upon the separate estate; for what hinders them from recovering at law this debt against the partnership, for it is money paid to one of the partners? They have nothing to do but to bring an action against the partners. The affairs of the partnership may be very much involved; but if they are arrested, they would pay it. It is not stated as a case where there are no joint effects. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get as much as they can from that first. I have no difficulty in ordering them to be admitted to prove, but not to receive a dividend." This rule was afterwards acted upon by Lord *Rosslyn* (b), and was adopted and followed by Lord *Eldon* in many subsequent cases, not because he was convinced of its propriety, or of its being better calculated to the due administration of justice than the doctrine introduced by Lord *Thurlow*, but he adhered to it, because it was the practice, and to avoid the mischief arising from shaking settled rules. (c) According to the rule, therefore, which these decisions have established, if there is a joint fund, or a solvent partner, a joint creditor is not entitled to prove his debt under a separate commission for the purpose of receiving a dividend, without the Lord Chancellor's order. (d)

(a) 3 Ves. 242.

(b) *Ex parte Abell*, 4 Ves. 837.

(c) *Ex parte Clay*, 6 Ves. 813, and the cases cited ib. in note. *Ex parte Kensington*, 14 Ves. 447. *Ex parte Taitt*, 16 Ves. 193.

(d) Mont. B. L. 230.

And notwithstanding the joint property is of the most trivial amount, yet if there is such a fund, of any, even the smallest description, and it is capable of being realised, the rule is inflexible, and there will be no departure from it. (a) Lord *Eldon*, indeed, admitted this qualification of the rule, that "if the property alleged to exist be of such a nature, and in such a situation, that any attempt to bring it within the reach of the joint creditors must be deemed a desperate, or, in point of expense, an unwarrantable attempt, that would authorise a departure from the rule; as in truth there would then be no joint property." (b) And joint estate has been said to mean such estate only as comes under the administration of the assignees to distribute, and not to extend to joint estate pledged for more than its value. (c) Therefore, a creditor having joint property of the bankrupts in pledge, and selling the same after the bankruptcy for a sum less than his debt, may, notwithstanding, prove for the difference against the separate estates of the bankrupts, if there is no other joint property. (d) But, until a sale takes place, the creditor will not be permitted to prove, because the amount of the debt remaining due, cannot be ascertained. (e) And if several firms are engaged in a joint adventure, and there is no joint property, the creditors of the adventure, in the event of bankruptcy, must prove against the estates of the individuals, and not of the firms. (g) So, although there is not any joint fund, yet if there is a solvent partner, a joint creditor will not be permitted to prove and receive a dividend under a separate commission. (h) And by the term *solvent partner* is understood a partner against whom no commission of bankruptcy has issued (i); for, it was recently observed (h), a person may be insolvent, and yet be able to pay a considerable

(a) *Ex parte* Peake, 2 Rose, 54. See also *In re* Lee, ib. in note.

(b) *Id.* *ibid.*

(c) *Ex parte* Hill, 2 N. R. 191. n.

(d) *Ex parte* Geller, 2 Madd. 262.

(e) *Ex parte* Hopley, 1 Jac. & Walk. 423. S. C. 2 Jac. & Walk. 220.; and 1 Glyn & James. 63. *Ex parte* Smith, 2 Rose, 64. *Ex parte* Greenwood, Buck, 323. *Ex parte* Barclay, 1 Glyn & James. 272. A pending execution, in respect of a joint debt, will not affect a creditor's right to prove a distinct separate debt, under a separate commission. *Ex parte* Stanborough, 5 Madd. 89.

(g) *Ex parte* Wylie, 2 Rose, 393.; but see *Ex parte* Nolte, 2 Gl. & Jam. 295. in which the authority of *Ex parte* Wylie is denied.

(h) *Ex parte* Kensington, 14 Ves. 447. *Ex parte* Kendall, ib. 449. *Ex parte* Sadler, 15 Ves. 52.

(i) *Everett v. Backhouse*, 10 Ves. 100.

(k) *Ex parte* Janson, 3 Madd. 229. S. C. Buck, 227.



part of his debts; and as a creditor, by using due diligence against such a debtor, might obtain payment, it follows that insolvency must, for this purpose, be distinguishable from bankruptcy; for in the latter case the whole of the property is absorbed by the commission, and there cannot possibly be any prospect of a successful result attending the legal vigilance of the creditor. The principle is, that whilst there is any fund, however small, to which to resort, or whilst a chance exists of obtaining payment from any of the debtors, who have not been declared bankrupts, the joint creditors cannot prove against the separate estate of one of the partners, in competition with his separate creditors. Where, indeed, no joint property existed, but there was a solvent partner abroad, who was not likely to return, Lord *Eldon* ordered proof of a joint debt under a separate commission, but he directed the order to recite that it was admitted there was not any joint fund. (a) And where the partner was insolvent at the time the proof was tendered, his lordship held that it could not be rejected, because the partner continued solvent for some time after the commission issued. (b) Joint creditors will also be permitted to prove under a separate commission, even where there is a subsisting joint estate or a solvent partner if they will discharge the demands which the separate creditors have upon the separate estate. (c) But it should seem that upon an application for this purpose, a mere offer to pay the separate debts would not be sufficient without some proof before the court as to their amount. (d) We have hitherto considered the subject principally with a view to the proof for taking a dividend. But long before the time of Lord *Rosslyn*, it had been the custom to allow creditors having no right to take dividends, to prove either against the joint or the separate estate respectively, for the purpose of voting in the choice of assignees, or of assenting to or dissenting from the certificate. (e) And in the same manner, where partnership property was supposed to have been taken under the separate commission, joint creditors were allowed to come in; and in two modern instances they were permitted to vote in the choice of assignees. (g) The new act (h), however, has

(a) *Ex parte* Pinkerton, 6 Ves. 814. n. 14 Ves. 449. See also *Ex parte* Machell, 2 Ves. & Bea. 216. S. C. 1 Rose, 447.

(b) *Ex parte* Jones, 1 Mont. B. L. 238.

(c) *Ex parte* Chandler, 9 Ves. 35. *Ex parte* Hubbard, 13 Ves. 424.

(d) *Ex parte* Taitt, 16 Ves. 195.

(e) Eden's B. L. 164.

(g) *Ex parte* Jones, 18 Ves. 283. *Ex parte* Taylor, ib. 284.

(h) 6 Geo. 4. c. 16. s. 62.

given a more extensive right to joint creditors under separate commissions, as it entitles them to prove for the purpose of voting in the choice of assignees, and of assenting to or dissenting from the certificate; but they are not to receive dividends to the prejudice of the separate creditors, except a joint creditor being a petitioning creditor in a commission against one member of a firm. It has been held that a creditor who proceeds to outlawry against two of three partners cannot prove his debt against the separate estate of the third partner, although the latter gave a separate cognovit in the action in which his copartners were outlawed. (a)

If joint creditors, under an order to prove against separate estates, on the ground of there being no joint property, prove against one or more of them exclusively of the rest, and any joint property is afterwards realized, the estates so burdened by the proof are entitled to be reimbursed out of the joint property to the extent of the proofs made against them, before the joint property is divisible between the separate estates. (b) And where both the joint and separate estates were liable to a debt to the crown, and by process more had been levied upon the joint estate than its proportion, contribution was decreed between the two estates, and it was referred to the Master to settle the proportion. (c)

We will now proceed to examine in what cases the *joint creditors are permitted to prove a debt due from a single partner to the partnership against the separate estate of that partner*, and afterwards we will advert to the right which an *individual partner possesses to satisfaction of a debt due to the partnership out of the surplus of the joint estate, in preference to the separate creditors of the indebted partner*. Where one partner has taken more than his share out of the joint fund, the joint creditors, as the rule is now established, cannot be admitted to prove against the separate estate of that partner, until his separate creditors are satisfied; unless it can be shown that, in drawing out the money, the partner acted fraudulently, with a view to benefit his separate, at the expense of the joint creditors. The law, sanctioned by the authorities of Lord *Talbot* (d), and Lord *Hardwicke* (e), formerly

(a) *Ex parte* Dunlop, Buck, 253.

(b) *Ex parte* Willock, 2 Rose, 392.

(c) *Rogers v. Mackenzie*, 4 Ves. 752.

(d) *Ex parte* Blake, Co. B. L. 503. S. C. *nom.* *Ex parte* Drake, cited 1 Atk. 225.

(e) *Ex parte* Hunter, 1 Atk. 223. S. C. Co. B. L. 500.

was, that if the debt raised by the partners against an individual partner arose out of contract, as upon a loan by the partnership to him, the joint creditors might be admitted to prove against the separate estate in competition with the separate creditors. But the opinions entertained by those learned judges have been receded from in more modern times ; and the settled doctrine now is, that if the claim arise out of contract, the estates are to be administered jointly and separately, as they are actually constituted at the time of the bankruptcy, the joint creditors not being permitted to recall into the joint fund what one partner has by contract, express or implied, subtracted from the joint, and applied in augmentation of his separate estate. (a) This rule was introduced by Lord *Thurlow*, who, having much considered the question, finally determined that the assignees on behalf of the joint, could not prove against the separate estate, unless the partner had taken the joint property with a fraudulent intent, to augment his separate estate. Thus, where *Fendall* was a dormant partner with *Lodge*, and *Lodge* took money from the partnership, to a considerable amount, without the knowledge of *Fendall*, who did not intermeddle in the partnership business, Lord *Thurlow*, after taking time to consider, thought he could not permit the assignees, under a joint commission, to prove against the separate estate of *Lodge*, without deciding upon a principle that must apply to all cases, and constantly occasion the taking an account between the partners and the partnership in every joint bankruptcy. He said, that if the affidavits had gone the length of connecting the bankruptcy with the institution of the partnership trade, and that *Lodge*, with a view of swindling *Fendall* out of his property, had got him into the trade, and then taken the effects of the partnership into his own hands, with a view to his separate creditors, it might have been different ; and the petition, on the part of the joint creditors, to prove against the separate estate, was dismissed. (b) The principle established by Lord *Thurlow*'s decisions has been acknowledged and followed by Lord *Eldon* (c) ; and it is now an indisputable rule in bankruptcy, that where the debt from one partner to the partnership was incurred with the privity of his copartners,

(a) *Ex parte Yonge*, 3 Ves. & Bea. 34. S. C. 2 Rose, 44.

(b) *Ex parte Lodge*, Co. B. L. 505. S. C. 1 Ves. jun. 166. See also 2 Ves. & Bea. 213. *Ex parte Batson*, Co. B. L. 503. *Ex parte Grill*, *ibid*.

(c) *Ex parte Harris*, 1 Rose, 129, 437. S. C. 2 Ves. & Bea. 210.



proof by the joint against the separate estate will not be admitted. Thus, if, upon the formation of a partnership of two persons, it is agreed that the money shall be paid into the bankers in their joint names, and such payment is not made in their joint names, but one of the partners permits the money to be paid in in the name of the other partner, by whom, and in whose name, all the drafts are drawn, the court will infer that such partner was permitted to apply the partnership funds to his own use. (a) And where one partner, intrusted with the entire management of the partnership concern, withdraws money for his separate use, which he openly and without disguise or concealment enters in the partnership books, this is not such a fraud as will entitle the joint creditors to prove against the separate estate. (b) Where, however, the debt does not arise out of contract, but out of a fraudulent breach of the obligations existing between the partners, a case of exception is formed to the general rule, and under such circumstances it has been decided and understood from *Fordyce's* case (c) down to the present time, that the funds subtracted shall be considered as detached from the general partnership balance, and as forming a distinct debt due from one estate to the other. In such cases the court has said, it is against conscience that the separate creditors should resist the restoration of that which the separate debtor, from whom the joint creditors seek payment, has so unrighteously, against the consent of his partners, and in fraud of their contract, taken out of the joint fund. And to constitute a fraudulent subtraction within the meaning of this exception, any taking in violation of express or implied contract is presumptively sufficient. This was clearly and emphatically advanced by Lord *Eldon* on a recent occasion (d), when he thus expressed himself: "I now lay down, that if, in either the expressed or implied terms of an agreement for a partnership, there is a prohibition of the act, and it is done without the knowledge, consent, privity, or subsequent approbation of the other partner, before the bankruptcy; and to the intent to apply partnership funds to private purposes, that is *primâ facie* a fraud upon the partnership. To illustrate this, I will put the simple case of a partnership between two; and, by the articles, all the money is

(a) *Id. ibid.*

(b) *Ex parte Smith*, 1 Glyn & James, 74. S. C. 6 Madd. 2.

(c) *Ex parte Cust*, Co. B. L. 506.

(d) *Ex parte Harris*, 2 Ves. & Bea. 214.

to be paid in to their joint names at a particular bank, and they are prohibited from drawing out more than 50*l.* a month each for individual purposes; that during the month of *January* they mutually observed those articles by paying in, and on the first of *February*, one, instead of 50*l.* draws out 550*l.*, and upon the next day a bankruptcy happens; if it is made out that this over-drawing was for private purposes, and without the knowledge, consent, privity, or subsequent approbation of the other, as it was for private purposes, and therefore must be for the increase of the individual's estate; and as it was against the covenanted rights, or rather the prohibitions, affecting both, and without the knowledge, consent, privity, or subsequent approbation of the copartner, it is as much a fraud within Lord *Thurlow's* rule, as if, according to the expression I am informed I formerly used, he had stolen the property." In the foregoing case, his lordship directed the commissioners to inquire whether the money was applied by the single partner to his separate use, without the knowledge, privity, or approbation of his copartner, and if so, he declared that the joint creditors were entitled to prove against the separate estate. (*a*) And in a late case, where by the course of bankers, business stock was invested for capital in the name of one of the partners, who appropriated part thereof without the privity of the others, and afterwards retained it, but was by the firm charged with the dividends on it, and the transaction treated as a sale and appropriation to his separate use, it was held, that it was not an acquiescence, amounting to subsequent approbation, and that the joint estate was entitled to prove for such sum against the separate estate of that partner. (*b*) In another case of a fraudulent subtraction of partnership property by one partner who became bankrupt, the two others remaining solvent, and having paid the debts of the partnership, a question arose whether the solvency of the two prevented them from having that benefit against the separate estate which the creditors of the partnership would have had if all three had become bankrupt. It was contended that they could not, as they would be entering into competition with their own creditors; that the two could not be represented as creditors of the bankrupt partner in this transaction, as in fact the three were so. But it was said by the court, that equity would modify the transaction, and put it in such circumstances

(*a*) S. C. 1 Rose, 129.

(*b*) *Ex parte Watkins*, 1 Mont. & M. 57.

that the equitable remedy of the two solvent partners should not be defeated by the fact that they might not have a legal remedy. That in bankruptcy there is both a legal and an equitable jurisdiction, and previously to the bankruptcy the solvent partners might have filed a bill to compel the other to replace the money so fraudulently obtained: that right could not be taken from them by the bankruptcy, and the fact that the separate creditors have a right to the separate estate; as though in law the two solvent partners could not strictly be the creditors of the one, and though if all were solvent the two could not maintain an action against one of them, yet in equity the money so abstracted by that one is the debt of the two, to be applied by them as trustees of the three: and the bankruptcy could not alter that. (a) So, in the instance which has been before adverted to, of the acting partner withdrawing part of the joint funds for his separate use, if, instead of avowing the fact at the time, he, by the entries in the books, disguised the transaction, or wholly omitted and concealed it, the joint creditors would have a claim upon the separate estate in competition with the separate creditors, to the extent of the sum withdrawn. (b) In general, however, cases of this kind must be decided upon their particular circumstances, and the conclusion of law, as to fraud, must depend upon the nature of those circumstances. But it may be observed, that the conduct of the parties in a partnership may supersede the stipulations of the articles, and raise a presumption of assent to a different agreement, and an approbation of a different mode of dealing with the partnership funds, from their knowledge of, and acquiescence in it. Therefore, where the articles of partnership provided that the partners should not draw out for their own individual use more than a certain sum every month, and that the money belonging to the concern should be lodged in the hands of a banker in their joint names, but after the formation of the partnership, the uniform practice had been for one partner to lodge the money of the concern with his own private money in the hands of a banker in his own name, and he had also been in the habit of paying and drawing out money as he saw occasion, and it appeared that the other partner was aware of this departure from the articles, for he not only kept the books, but the amount of the sums received and laid out by his copartner were regularly communicated to him,

(a) *Ex parte Yonge*, 3 Ves. & Bea. 31. S. C. 2 Rose, 40.

(b) *Ex parte Smith*, 1 Glyn & James, 74. S. C. 6 Madd. 2.



Lord *Eldon*, on a petition being presented by the assignees under a joint commission for liberty to prove against the separate estate of the one partner a sum of money, as having been applied by him to his own private use in violation of the partnership articles, held that such proof could not be admitted, because the one partner having knowingly acquiesced in what necessarily gave to the other the whole control over the joint funds, he must abide by the consequences of his own conduct, notwithstanding the perversion was in defiance of the original partnership contract. (a)

When the claims upon the partners and the joint funds are fully satisfied, (for as between a joint debtor and a joint creditor there cannot in any case be a competition,) (b) one partner may successfully assert a right to satisfaction of a debt due to the partnership from his copartner out of the surplus of the joint estate, in preference to the separate creditors of the latter; and if that fund should prove insufficient to discharge the demand, he may likewise insist on coming upon the separate estate *pari passu* with the separate creditors. (c) Under what circumstances such a right of retainer and such proof is allowed we will now inquire. The principle upon which the right of the solvent partner to the surplus of the joint estate, in exclusion of the separate creditors of his bankrupt partner, proceeds, we have already had frequent occasion to notice, and it is this,—that after payment of the partnership debts, the first object of a court of equity is, to place the partners themselves upon a footing of equality, by reimbursing one partner whatever he may have advanced beyond his proportion, or by making him refund the excess of his share which he may have subtracted. (d) The rights of the partners *inter se* are secondary and subservient only to those of the joint creditors, and although the assignees of a bankrupt partner have a lien upon his surplus share in the joint estate, yet that cannot be ascertained until the claims upon the joint fund, both by creditors and by the partnership, are discharged. There may not be any demands from third persons,

(a) *Ex parte Harris*, 1 Rose, 437. S. C. 2 Ves. & Bea. 210.

(b) *Ex parte Kendal*, 17 Ves. 521. *Ex parte Adams*, 1 Rose, 305.

(c) *Ex parte Terrell*, Buck, 345. *Fereday v. Wightwick*, 1 Tamlyn's Rep. 250. *Ex parte Reeve*, 9 Ves. 589.

(d) *Taylor v. Fields*, 4 Ves. 396. S. C. 15 Ves. 559. n. *Croft v. Pyke*, 3 P. Wms. 183. *West v. Skip*, 1 Ves. jun. 239. S. C. 2 Swanst. 586. *Dutton v. Morrison*, 17 Ves. 209. *Ex parte King*, ib. 115. *In re Wait*, 1 Jac. & Walk. 699.

but yet if one partner has a claim upon the other, the latter cannot take any thing until the claim of the former is satisfied. In fact the actual interest of the insolvent partner may be great, it may be little, or it may be nothing at all. (a) Where, therefore, there is a surplus of joint estate, the interest of a bankrupt partner in it is not available to his separate creditors until any subsisting demand of his copartner against it is discharged. This principle which is founded in equity and justice, was established in an early case. (b) There *Richardsons*, senior and junior, and *Gonson* were partners, and *Gonson* embezzled and wasted the joint stock, and contracting private debts became a bankrupt. The court seemed to think that out of the produce of the goods the debts owing by the joint trade ought to be paid in the first place, and that out of *Gonson's* share satisfaction must be made for what *Gonson* had wasted or embezzled, and that the assignees could be in no better condition than the bankrupt himself, and were entitled only to take what his third part would produce after debts paid and deductions for his embezzlement. This rule has been confirmed by a decree made by Lord *Talbot* in a case in which a bill was filed by *Goss* and *Neaulme Gromvegan* against the assignees of *Prevost*, setting forth that *Goss*, *Gromvegan*, and *Prevost*, became partners; that *Prevost* was intrusted with the goods in the shop and warehouse, but embezzled the copartnership stock, and applied the same to his own use, and suffered the partnership debts to be unpaid, and having contracted private debts on his own account, became a bankrupt, and a separate commission was taken out against him. A question being raised whether *Prevost's* share of the partnership stock ought not to be applied in the first place to pay what he was indebted to the partnership, Lord *Talbot* ordered an account of what *Prevost* had embezzled of the copartnership estate, and that the partnership debts should, in the first place, be paid as far as the copartnership estate would extend; and that if any of the partnership estate remained after the joint debts were paid, then the same to be

(a) *In re Wait*, *ante*.

(b) *Richardson v. Gooding*, 2 Vern. 293. It seems that a general loan of money by one partner to another, which has no relation to and is not applied to the partnership trade, does not give to the lender a specific lien upon the share of the borrower, so as to entitle him to be preferred to separate creditors, either in the case of a bankruptcy or after the death of a partner, where his effects have become subject to the rule of distributing assets. See the judgments of Lord Chief Justice *Lee* and Lord *Hardwicke* in *Ryal v. Rowles*, 1 Atk. 181. 184.

divided, and the partnership to be paid out of *Prevost's* share what he had embezzled. (a) And it has been settled by subsequent adjudications, that if the surplus is not sufficient to pay the solvent partner all that is due upon his debt, he is entitled to come in with the separate creditors of the other partner upon his separate estate. (b) A retired partner, who had permitted his name to be continued, has been held not entitled to prove, until a discharge by indemnity or otherwise from the joint creditors was produced. (c)

Where one partner remains solvent, and is a creditor of his bankrupt copartner, there is no doubt but that proof of his debt may be admitted under a separate commission against the latter (d); although, if there be any outstanding joint debts, they must either be discharged (e), or the joint estate must be indemnified before such proof will be admitted, since the proof of a partner will not be allowed to come in conflict with that of the joint creditors. (g) And formerly, where the claim of an individual partner originated in his having discharged joint debts, it was essential, in order to entitle him to prove against the separate estate of his bankrupt partner for his proportion, that the debts should have been discharged, and the claim should have arisen antecedently to the bankruptcy. For if the right of calling upon the bankrupt partner for contribution did not accrue until after he became bankrupt, the only redress the solvent partner had was by action at law or by bill in equity. (h) The rule, however, in that respect, is now inverted, and by Sir Samuel Romilly's

(a) *Goss v. Dufresnoy*, Davies, 371. 2 Eq. Abr. 110. See also *Hankey v. Garret*, 1 Ves. jun. 236. S. C. 3 Bro. C. C. 457.

(b) *Ex parte King*, 17 Ves. 115. *Ex parte Terrell*, Buck, 345.

(c) *Ex parte Ellis*, 2 Glyn & James. 312.

(d) *Ex parte Drake*, cited 1 Atk. 225. *Craven v. Knight*, 2 Ch. Rep. 226. There is a case which militates against this rule, in which it seems to have been decided that such proof could not be admitted. It was an application by a person who stated that he had been fraudulently induced to engage in a partnership, and to pay a premium of 1000*l.*, upon admission as a member of the firm, to prove such 1000*l.* upon the bankruptcy of the person with whom he had been so fraudulently induced to join in partnership; and Lord *Eldon*, after observing that, although the petitioner might have an equity to be considered as never having been a partner, yet that it was extremely difficult to say as to third persons he was not a partner, ordered that the petitioner be at liberty to enter a claim, but not to prove with the separate creditors. *Ex parte Broome*, 1 Rose, 69.

(e) *Er parte Taylor*, 2 Rose, 175.

(g) *Ex parte Ogilby*, 3 Ves. & Bea. 133. S. C. 2 Rose, 177.

(h) *Wright v. Hunter*, 1 East, 20. S. C. 5 Ves. 792.



Act (a), the debt, if paid subsequently to the bankruptcy, cannot be made the foundation of an action, but must be proved under the commission. Thus, where upon a dissolution of partnership between three partners, two of the three assigned to the other all their share in the partnership debts and effects, and the other covenanted to pay all debts due from the partnership, and to indemnify the two from the payment of the same, and from all actions and costs by reason of the nonpayment of the same, and afterwards became bankrupt, when the two were obliged to pay; upon the question, whether they could have proved under his commission, Lord *Ellenborough* observed, that though they were liable at law as co-debtors with the bankrupt, for his and their own debt, yet in equity he was solely liable, and they were sureties; for by the covenant he became, as between the parties to the covenant, the principal debtor; the debt was his debt, although as to other parties the solvent partners still remained liable, and therefore when they paid the debt, they paid in his discharge, and the court accordingly held their claim discharged by the certificate. (b) And in a more recent case it was decided, that where on the dissolution of a partnership the continuing partners covenant to pay all the joint debts, on the bankruptcy of such partners, the outgoing partner may prove the amount of debts which he has been compelled to pay since the dissolution. (c) So where upon the retirement of one partner, the continuing partners taking the concern in its actual state, undertook by deed to indemnify the former, it being then, as to partnership effects, insolvent; and upon the death of one, and the bankruptcy of the other continuing partner, the retiring one had been called upon to pay; it was held, that the permitting the one to retire without taking from him the proportion of the deficiency, did not necessarily make the deed fraudulent as against the remaining partners, and that the former was therefore entitled to prove under the commission. (d) And where a dissolution of the partnership has taken place previously to the bankruptcy of some of the partners, and those partners, on closing the transactions of the partnership, have been found indebted to the others, proof of the debt will be admitted under the commission:

(a) 49 Geo. 3. c. 121. s. 8., repealed and re-enacted by the 6 Geo. 4. c. 16. s. 52.

(b) *Wood v. Dodgson*, 2 Mau. & Selw. 195.

(c) *Parker v. Ramsbottom*, 3 B. & C. 257. S. C. 5 D. & R. 138.

(d) *Ex parte Carpenter*, 1 Mont. & M. 1.

and if the bankrupts have covenanted by the deed of dissolution to pay the debt, it will be no objection to the proof of the solvent partners that they subsequently bargained by parol for a mode of payment which infected the debt with usury, for such an agreement amounts only to an accord, which cannot be considered a performance or satisfaction of a specialty; and it is settled that where a *bonâ fide* debt is due, the right to claim it is not invalidated by a subsequent usurious agreement. (a) Thus, in a late case, it appeared that A, B, and C carried on the business of bankers in copartnership; A advanced large sums of money to the concern, which he raised by selling out stock, and he took separate bonds for 18,000*l.* from B, and C conditioned for replacing of 9000*l.* three per cent. consols by each, being their respective proportions of the stock sold by A. The stock not being replaced, A brought actions and recovered judgments on the bonds. A afterwards retired from the concern, and at that time 20,000*l.* three per cent. consols was due to him; by the deed of dissolution B and C covenanted to replace it by four instalments, and that if they failed to do so, A might resort to the judgments recovered on the bonds; and further, that he should have a lien on certain specified securities for that debt. One instalment was replaced when due, but B and C having failed to replace the second, a new arrangement (not under seal) was entered into, whereby it was agreed that the transaction should be considered as a loan of money from the first, and that the sum produced by the sale of the 15,000*l.* three per cent. consols which remained due, which was 10,083*l.* should be the debt, and be repaid at a future day with five per cent. interest. The value of 15,000*l.* three per cent. consols at the date of this last agreement was 8437*l.* Before any part of the 10,083*l.* was paid, B and C became bankrupts, and at the issuing of the commission, two out of the three remaining days fixed by the deed of dissolution for the retransfer of stock had passed. It was held that the second agreement was void for usury, but that the deed of dissolution remained binding, and that A might prove under the commission against B and C for the 15,000*l.* three per cent. consols; the value of the two instalments due before the bankruptcy to be ascertained by the price of consols on the days when those sums respectively became due; the value of the third

(a) Com. Dig. Usury, (B). Pollard v. Scholey, Cro. Eliz. 20. Ferrall v. Shaen, 1 Saund. 294. Gray v. Fowler, 1 H. Bl. 462.

to be taken at the price of consols on the day when the commission issued, with a rebate for the interval between that day and the day fixed for the retransfer of that instalment; and further that A still had the lien given by the deed. (a) The right of solvent partners who have paid all the joint debts to prove against the separate estate, is also sustainable on the ground that they are in the nature of *sureties or persons liable*, and accordingly entitled to prove under the provisions of Sir Samuel Romilly's Act; a right which has been expressly recognised in several cases, wherever it does not affect creditors claiming in competition with them. Thus, where the acting partner of a firm had made an unauthorised use of the partnership name, by creating liabilities, the produce of which he had applied to his separate use, and became bankrupt; the solvent partners having, after the bankruptcy, satisfied the liabilities out of their own funds, and paid all the partnership debts, were held entitled to prove the whole amount so charged by the bankrupt upon the partnership funds against his separate estate; and Lord Eldon said "that if it were necessary to seek any support to the moral justice of the case, the 49 Geo. 3. c. 121. s. 8. would supply it; and he considered that the solvent partners were entitled to prove under the description in the act of *persons liable*." (b) So, a solvent partner has been held entitled to prove against the estate of a bankrupt copartner the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying the bankrupt's estate against them. (c) And in another case under a joint commission, the separate estate of one was determined to have a lien on the other's share of a surplus of the joint estate, in respect of a debt proved upon bills drawn by the one in the name of the firm for a separate debt; and that the joint creditors might come in with the separate creditors for the deficiency. (d) So in a recent case, where under a separate commission accounts of the joint and separate estates had been kept, and there was a surplus of the former, the bankrupt being indebted upon taking the partnership accounts, it was holden that the solvent partners were entitled to the surplus, and if it were insufficient, they were to be at liberty

(a) *Parker v. Ramsbottom*, 3 B. & C. 257. S. C. 5 D. & R. 138.

(b) *Ex parte Yonge*, 3 Ves. & Bea. 31. S. C. 2 Rose, 40. See also *Ex parte Ogilby*, 3 Ves. & Bea. 135. S. C. 2 Rose, 177.

(c) *Ex parte Taylor*, 2 Rose, 175.

(d) *Ex parte King*, 17 Ves. 115.



to prove against the separate estate for the difference. (a) But it seems that proof will not now be admitted by a solvent partner against the separate estate until the joint debts are actually paid, and mere proof has been said to be payment only so far as it produces payment. (b) Where a solvent partner has paid all the joint debts, it has been a question whether, if the estate of one of the bankrupts is insufficient to pay 20s. in the pound, the solvent partner will be allowed to prove the deficiency of each estate against the estate of the other? Sir *John Leach* has, in two instances (c), determined against such right. His Honour has considered that proof is equivalent to payment without regard to the amount of the dividend, and that the principle is, that the surety is to prove for such sum, as, at the time of the bankruptcy, the principal debtor was bound to pay or provide. It must be observed, however, that considerable doubts have been entertained of the soundness of this doctrine (d), and that it has been considered that the equitable principles applicable to cases of principal and surety, independent of contract, as to enforcing contribution, have not been sufficiently attended to in them. A solvent partner has been appointed receiver of the partnership property, but without a salary. (e)

Formerly, if a creditor proved a debt under a commission of bankruptcy, it did not amount to a conclusive *election to take under the commission*, for a creditor has been suffered to make his election of proceeding at law against the bankrupt himself, after having proved his debt and received two dividends, upon condition of refunding what he had received. (g) But, by a modern statute (h), it is enacted, that the proving or claiming a debt under a commission by any creditor shall be deemed an election by the creditor to take the benefit of the commission, with respect to the debt proved or claimed, provided that where any such creditor shall have brought any action against the bankrupt jointly with any other person, his relinquishing such action against

(a) *Ex parte Terrell*, Buck, 345.

(b) *Ex parte Moore*, 2 Gl. & James, 165. overruling the decision of the Vice-Chancellor in *S. C. Buck*, 492. See also *Ex parte Carter*, 2 Gl. & James, 293. *Ex parte Ellis*, *ibid.* 312.

(c) *Ex parte Watson*, 4 Madd. 477. S. C. Buck, 450. *Ex parte Smith*, Buck, 492.

(d) *Ex parte Hunter*, Buck, 552.

(e) *Ex parte Stoveld*, 1 Glyn & James, 303.

(g) Co. B. L. 146.

(h) 49 Geo. 3. c. 121. s. 14. See the 6 Geo. 4. c. 16. s. 59.

the bankrupt shall not in any manner affect it against such other person. This clause does not extend to prevent a creditor, who proves a joint debt under a commission against one partner, from suing the others. (a) And where separate commissions were issued against three out of four partners, to which they conformed and passed their examinations, and an order was made by the Lord Chancellor, allowing the joint creditors to prove their debts under the commission of one of the three; under that order a joint creditor proved his debt, and afterwards sued all the partners for the same debt, and arrested one of the other two under whose commission he had not proved; it was determined by the Court of King's Bench that the proof of the debt against the estate of one was not an election within the meaning of the statute, so as to prevent the creditor proceeding against the others by action, and therefore that the bankrupt arrested was not entitled to be discharged out of custody. (b) But where two partners gave a joint and several bond to a third person, who afterwards became indebted to one of them, and the other having become bankrupt, the obligee proved the bond under the commission, and then brought a joint action against both the partners, to which the bankrupt pleaded his certificate; the Lord Chancellor held that the obligee, having elected to proceed severally by proving the bond under the commission, was not at liberty to bring a joint action upon it, but must proceed against the solvent partner alone. (c) And before the passing of the foregoing statute, if a creditor had debts due to him from the bankrupt of distinct natures, or in different rights, he was at liberty to prove one under the commission, and proceed at law for the recovery of the other. (d) But in a late case it was laid down, that if a creditor has debts due to him from the same person of a distinct nature, and he proceeds at law for the recovery of the one, and afterwards proves, or claims to prove the other under the commission, such proof or claim operates as a relinquishment of the action previously brought. Thus, where one partner arrested, and was proceeding in an action against

(a) *Heath v. Hall*, 4 Taunt. 526.

(b) *Young v. Glass*, 16 East, 252. It has been said, that, in equity, the creditor could not proceed against any of the bankrupts. Mont. Dig. of New Decis. in Bank. 1st part, p. 42. n. (c). See *Ex parte Bolton*, Buck, 12.

(c) *Bradley v. Millar*, 1 Rose, 273.

(d) *Ex parte Botterill*, 1 Atk. 102. *Ex parte Matthews*, 3 Atk. 816.

his copartner on a promissory note, and afterwards had a claim entered upon the proceedings under a commission against him on a letter of guarantee, it was held that such claim was an election to take the benefit of the commission, and that it operated as a relinquishment of the action. (a) However, in a more recent case, where the bankrupt paid for goods sold and delivered by a bill of the exact amount, and afterwards by a second and distinct contract, purchased others, for which afterwards a bill was also given; upon his becoming bankrupt, the first bill was proved under the commission, at which time the second was outstanding in the hands of a third person, to whom it had been indorsed for valuable consideration, but it had been dishonoured, and notice thereof given to the vendor; it was subsequently returned to him, and he commenced an action on it in the Court of King's Bench; it was held, upon the construction of the latter part of the clause of the 6 Geo. 4. c. 16. s. 59., and with reference to the decisions at law, that the effect of proof was an election only as to the particular debt proved; and that to constitute distinct debts, it is not requisite that they should be of distinct natures, but it is sufficient if they arise upon distinct contracts, and the vendor was therefore not precluded from proceeding at law. (b) When the bankrupt under whose commission the creditor has proved is, for the sake of conformity, a necessary party to an action against the other partners,—as a court of law will not, if he be joined, interfere by ordering a *nolle prosequi* to be entered,—the Lord Chancellor will direct the creditor to indemnify the bankrupt against all the expenses of the action, and not to take advantage of the verdict and judgment against him; and if an indemnity be not given, he will order the bankrupt's name to be struck out. (c)

Both *joint and separate creditors*, whatever doubts may have been entertained as to their respective rights to receive satis-

(a) *Ex parte* Glover, 1 Glyn & James. 270. It seems the statute does not apply to actions for distinct demands brought subsequent to proof or claim. *Id. ibid.*; and see *Ex parte* Dickson, 1 Rose, 98. *Ex parte* Hardenberg, 1 Rose, 204. *Ex parte* Chambers, 1 Mont. & M. 130.

(b) *Ex parte* Edwards, 1 Mont. & M. 116., reversing the decision of the Vice Chancellor; *semble*, it would not have varied the right, if the vendor had, at the time of his proof on the first bill, also been the holder of the second. *Id. ibid.*; and see *Watson v. Medex*, 1 B. & A. 121. *Harley v. Greenwood*, 5 B. & A. 95. *Bridgett v. Mills*, 4 Bingh. 18.

(c) *Ex parte* Read, 1 Ves. & Bea. 346. S. C. 1 Rose, 460.



faction, have always been allowed to *prove their debts* under joint and separate commissions, for the purpose of *assenting or objecting to the certificate*. (a) This natural justice requires, for all debts, whether joint or separate, are equally discharged by the certificate under either a separate or a joint commission. The statutes say nothing about joint or separate debts, or joint or separate commissions, but discharge the bankrupt generally from all debts due or owing by him before he became bankrupt; and a joint debt is the debt of each partner, as well as the debt of all the partners jointly. After the passing of the statute 4 & 5 Ann. c. 17, a doubt arose whether the certificate obtained by one partner or joint debtor should discharge the other, or he should still be liable to the debt as if the bankrupt had never been discharged. To remove which, by the statute 10 Ann. c. 15. s. 3. (b) it was enacted and declared, that "the discharge of any bankrupt or bankrupts, by force of the said act, or any other acts relating to bankrupts, from the debts by him, her, or them, due and owing at the time that he, she, or they did become a bankrupt, shall not be construed, nor was meant or intended to release or discharge any other person or persons who was or were partner or partners with the said bankrupt in trade, at the time he, she, or they became a bankrupt, or then stood jointly bound or had made any joint contract together with such bankrupt or bankrupts for the same debt or debts from which he was discharged as aforesaid, but that, notwithstanding such discharge, such partner and partners, joint obligor and obligors, and joint contractors with such bankrupt and bankrupts as aforesaid, shall be and stand chargeable with and liable to pay such debt and debts, and to perform such contracts, as if the said bankrupt and bankrupts had never been discharged from the same." The expediency and necessity of this legislative provision, although no doubt introduced *ex majori cautela*, may still be open to argument and observation. It is difficult to conceive how the signing a bankrupt's certificate could have operated as an ordinary release with regard to any third person; for it is the act of parliament which gives that release, in consequence of the certified conformity of the bankrupt to the re-

(a) *Ex parte Taitt*, 16 Ves. 192. Whitm. B. L. 276. See the 6 Geo. 4. c. 16. s. 62.

(b) Re-enacted by the 6 Geo. 4. c. 16. s. 121.

quisitions of the bankrupt laws. A man, by signing a certificate, does not release his own debt, unless the requisite number of creditors afterwards sign; and if they do sign, the debts of those who do not sign are as much released as the debts of those who do sign. But however this may have been, independently of the statute, all question on the subject is put at rest by its enactment. It has been decided that a creditor by signing the certificate of a surviving partner does not thereby release the estate of a deceased partner. (a) In a late case, upon the petition of the solvent partner, to whom no want of due diligence was imputable, the certificate of his bankrupt partner was stayed until the partnership accounts could be taken before the commissioners. (b) But where a certificate under a separate commission is lying before the Lord Chancellor for allowance, it will not be stayed merely because a joint commission is issued. And if the certificate is fairly obtained, the Lord Chancellor will allow it, and to give it effect will impound the separate commission in the bankrupt office instead of superseding it. (c)

We will now proceed to examine the law of *set-off under commissions against partners*, which respects joint and separate commissions equally, and regulates both the collection and distribution of the estate of the bankrupts. The right of set-off in these cases, may be considered either as it is given by statute, and therefore *exists at law*, or as it *prevails in equity*. To the former we will, in the first instance, advert. When, at the time of the act of bankruptcy, there are cross demands subsisting between the bankrupt and a creditor, the latter, by setting-off his debt against the demand upon him, stands in a better situation than those creditors who, not being indebted to the bankrupt's estate, can only prove their debts under the commission, and receive dividends. In equity, long anterior to the statutes permitting a set-off, a party might avail himself of any cross-demand, and preclude his creditor from recovering more than the balance which might be due to him on a fair adjustment of accounts. And though the spirit of the bankrupt laws is to make an equal distribution amongst all the creditors, yet this must, in justice, be governed by the nature of the deal-

(a) *Sleech's case*, 1 Meriv. 570.

(b) *Ex parte Hadley*, 1 Glyn & James. 193.

(c) *Ex parte Tobin*, 1 Ves. & Bea. 308.

ings between the parties; and as it may be fairly presumed, that where mutual transactions have taken place between a bankrupt and another trader, they have respectively given greater credit to each other than would have taken place in any separate *ex parte* dealings; it is therefore just, that, in the case of bankruptcy, their mutual demands should be set against each other. Formerly, indeed, it was determined, that the statute for setting-off mutual debts did not extend to assignees of bankrupts, because the debts cannot be mutual, unless the remedies are so likewise (*a*); but the case of bankruptcy has in several instances been the object of legislative provision (*b*), and now by a late statute (*c*) it is enacted "that where there has been *mutual credit* given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt, may also be set-off in manner aforesaid against such estate: provided, that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." It is observable, that this statute, as well as the statutes which preceded it, unlike the statutes of set-off, relate not only to mutual debts, but embrace also mutual credits. We have already inquired (*d*) what are to be considered as mutual debts, and therefore capable of being set against each other. Our observations in this place will consequently be directed to ascertain what is a mutual credit within the statute, and in what cases, as affecting partners, it is allowed to form the subject matter of set-off. Mutual credit is a term of more comprehensive signification than mutual debts; it imports something beyond what is conveyed by the idea of a mutuality of debt. Lord *Mansfield* has observed, that the

(*a*) *Ryal v. Larkin*, 1 Wils. 155. Ball. N.P. 177. But see *Redoubt v. Brough*, Cowp. 135. Anon. 1 Mod. 215, *contra*.

(*b*) 4 Anne, c. 17. s. 11. 7 Anne, c. 25. s. 4. 5 Geo. 1. c. 24. 5 Geo. 2. c. 30. s. 28. 46 Geo. 3. c. 135. s. 3.

(*c*) 6 Geo. 4. c. 16. s. 50.

(*d*) See *ante*, p. 137.



legislature provided for mutual credit, in order to avoid the injustice which would ensue, were the right of set-off confined to cases of mutual debts only. (a) And the courts, both of law and equity, have not only ascribed to mutual credit, as contradistinguished from mutual debts, a more extended operation, but the term, of itself extensive, has been enlarged by a most liberal construction. It has been applied to cases where parties have been trusting each other at the time of the bankruptcy, and has never been narrowed to pecuniary demands which were then liquidated: and, a doctrine which seems founded on notions of natural equity, the statute authorises the bringing into mutual account a great variety of items, which could not be made the subject of set-off. The term *mutual credit* is, however, confined to demands on such credits only as, in their nature, will terminate in a debt. For instance, mutual credit arises where a debt is due from one party, and credit is given by him to the other for a sum of money payable at a future day, because it will then become a debt; and so, where there is a debt on one side, and a delivery of property, with directions to turn it into money, on the other; for the credit given by the delivery of the property will, on a sale, assume the character of a debt. (b) But where there is a mere deposit of property, without any authority to convert it into money, as a sale is not contemplated by the parties, no debt can ever arise out of it, and therefore it is not a credit within the intent of the statute. (c) And a guarantee which is merely a contract to indemnify upon a contingency, cannot form the subject of a mutual credit, because it is in the nature of a claim for unliquidated damages. (d) Neither is mutual credit constituted by the deposit of a security for a specific purpose; as if a person, previously to his bankruptcy, leave a bill with his creditor, under a promise by the latter that he will get it discounted, or advance the money on it, this does not create a mutual credit. (e)

(a) *French v. Fenn, Co.* B. L. 538. (b) *Easum v. Cato*, 5 B. & A. 861.

(c) *Rose v. Hart*, 2 B. Moore, 547. S. C. 8 Taunt. 499; but see *Ex parte Deeze*, 1 Atk. 228. *Ex parte Ockenden*, *ibid.* 235.

(d) *Sampson v. Burton*, 4 B. Moore, 515. S. C. 2 Brod. & Bingh. 89. See *Glennie v. Edmunds*, 4 Taunt. 775. *Hancock v. Entwisle*, 3 T. R. 435.

(e) *Key v. Flint*, 1 B. Moore, 451. S. C. 8 Taunt. 21. See also *Ex parte Flint*, 1 Swanst. 38. *Buchanan v. Findlay*, 9 B. & C. 738. These cases proceed on the principle, that where goods or bills are deposited for a specific object, and the bailee will not or cannot perform the object, he is bound to return them, the property of the bailor not being divested or transferred until the object is performed.

The legislature, in using the term *mutual credit*, meant only such credit and debts as form the subject of an account or debt which may be set against some other account; and where this occurs, mutual credit may be constituted, though the parties did not mean particularly to trust each other. (a) And a *trust* between two parties has been held to be a mutual credit. (b) Therefore where three persons joined in an adventure to purchase and sell some pearls, and one only was to advance the money and to sell them, but the profit and loss were to be divided between them in thirds; one of the parties became a bankrupt, and the party who was to sell the pearls was allowed to set-off a debt due to him from the bankrupt, for goods sold before the bankruptcy, in an action commenced against him by the assignees, against the third of the adventure due to the bankrupt, although the pearls were not sold, nor the produce received till after the bankruptcy. (c) Directors or trustees of a company incorporated by charter, or act of parliament, cannot set-off a debt due to them in their individual characters, against a demand made upon them by the assignees of a bankrupt, for stock due to the bankrupt from the company in their corporate capacity. (d) But where there was an express by-law, subjecting the stock of each member to any debts he should owe the company, and the banker of the company was indebted to them for a balance in his hands, and became a bankrupt, the company was allowed to set-off the stock which the bankrupt held in the company against the balance due to them upon the banking account. (e)

In the construction of the former acts relating to this subject, it was held as a general rule, that no debt or credit could be opposed to each other by way of set-off, unless each debt or credit accrued or was given either before the bankruptcy (g), or upwards of two calendar months before the commission issued, founded on a prior secret and unknown act of bankruptcy (h);

(a) *Hankey v. Smith*, 3 T. R. 507.

(b) *Atkinson v. Elliott*, 7 T. R. 380.

(c) *French v. Fenn*, Co. B. L. (7th ed.) 536.

(d) *Melioruchi v. Royal Exch. Ass. Company*, 1 Eq. C. Abr. 9.

(e) *Gibson v. Hudson's Bay Company*, 1 Eq. C. Abr. 9. S. C. 1 Stra. 645. *Child v. Same*, 2 P. Wms. 207.

(g) *Ex parte Boyle*, Co. B. L. 542. A payment after the bankruptcy upon a mere liability existing before, is capable of set-off within the clause as to mutual credit. *Id. ibid.* *Ex parte Wagstaff*, 13 Ves. 65.

(h) *Southwood v. Taylor*, 1 B. & A. 471. See the 6 Geo. 4. c. 16. s. 81.

and this construction must also be referred to the general rule in bankruptcy, that no creditor whose debt did not arise before the bankruptcy can obtain relief under a commission. Therefore, if goods are originally pledged for a specific sum, and, after acts of bankruptcy committed by the pawner, the pawnee advance a further sum upon them, this latter advance does not constitute a case of mutual credit, and the pawnee acquires no lien on the goods as against the assignees of the bankrupt, in respect of such subsequent advance. (a) But if the ground of the proposed set-off constituted a *credit* in its origin, though not strictly a debt before the act of bankruptcy, it may, as we have seen, be set off under the clause of mutual credit. (b) Doubts have been entertained, whether in an action by the assignees under a joint commission for money paid between the times of the bankruptcy of the two partners, there can be a set-off of a debt due before the bankruptcy of either of the partners. (c)

The right of set-off in bankruptcy is, in general, governed by the same principles as prevail at law, and therefore a strict mutuality is necessary; and, as the statute relating to mutual credit was intended to give a certain extension to the statutes of set-off, it must, as it introduces new remedies, be construed strictly, and cannot be applied to cases not within its letter. Thus, where A had a joint demand against B and C, who were also creditors of A, B having, by deed, made himself separately liable to A on account of the original joint demand, was holden not entitled to set off the joint demand due to himself and C. (d) And in a recent case (e), in which two out of three partners became bankrupts, and their assignees, with the solvent partner, brought an action against a broker, for the proceeds of bills belonging to the firm in his hands; it was held, that the broker was not entitled to set the amount of the bills against a debt due to him from the firm. Facts of such a description cannot be said to constitute a case of mutual credit, either within the letter or the meaning of the statute; not within its letter, because the statute only relates to mutual credits between bankrupts and other persons, and not to credit existing between bankrupts together with a solvent person

(a) *Birdwood v. Hart*, 5 Price, 593.

(b) *Cullen's B. L.* 199. *Ouchterlony v. Easterby*, 4 Taunt. 888.

(c) *Smith v. Goddard*, 3 Bos. & Pul. 465.

(d) *Ex parte Ross*, Buck, 125.

(e) *Staniforth v. Fellows*, 1 Marsh. 184.



on the one side, and a third person on the other; nor within its meaning, because, notwithstanding the bankruptcy of some of the partners, the person claiming the right of set-off has still a solvent partner to whom he may resort for the recovery of his debt. Where bills were drawn by one partner, and accepted by the defendant, and discounted by the firm for his convenience, having money in their hands of his at the time, it was held that between the parties it constituted a mutual credit, and the partners could not, by paying away the bills which were afterwards returned to them, put an end to that mutual credit so as to deprive the defendant of his right to set-off any debt due from the firm to him against the sum claimed by them, or their assignees, from him, as such acceptor. (a)

We will now inquire in what cases a *set-off* is allowed *in equity*. Equitable set-off is where, by reason of the nature of the cross demand, there can be no set-off at law (b); and there is this difference between set-off in equity and set-off at law, that in equity it prevailed long before the statutes (c); and these being enabling statutes, they do not defeat or control the original jurisdiction of courts of equity in cases where there would have been an equitable set-off previous to the statutes. The Lord Chancellor, therefore, sitting in bankruptcy, exercising an equitable, as well as a legal jurisdiction, will extend that jurisdiction to cases of set-off that are not only not within the immediate operation of the statutes (d), but even to cases where an action would not lie at common law, and where the Court of Chancery would not, upon a bill, decree an account. (e) Under particular circumstances, where great injustice would otherwise prevail, and there is a natural equity going beyond the statute, the Lord Chancellor will, where a bankrupt is a creditor of a principal and surety, and a debtor to the principal, restrain the assignees from proceeding at law, either against the principal and surety, or against the surety separately; and will order the joint and separate debts to be set-off. Thus, where *Ann Stephens* directed her bankers to sell exchequer annuities, and to invest the produce

(a) *Bolland v. Nash*, 2 B. & Cr. 105. S. C. 2 M. & Ry. 189.

(b) *Whyte v. O'Brien*, 1 Sim. & Stu. 551.

(c) *Per Lord Eldon, Ex parte Blagden*, 19 Ves. 467.

(d) *Ex parte Stephens*, 11 Ves. 27. *Ex parte Hanson*, 12 Ves. 348. *James v. Kynnier*, 5 Ves. 108.

(e) *Cullen's B. L.* 196.

in navy annuities, and the bankers informed her they had followed her directions, and an entry was made in her banking book to that effect in *October* 1785, and credit was given to her regularly for the dividends; afterwards in the year 1796, her brother, having a separate account with the bankers, proposed to borrow of them 1000*l.* upon the security of the joint and several note of himself and his sister, which was agreed to, and the note given accordingly. The bankers became bankrupts; and it then appeared that they had not purchased the navy annuities, and that the documents which they had exhibited to *Ann Stephens*, in proof of the purchase, were false. The assignees of the bankrupts brought an action against the brother alone upon the note; and the brother and sister petitioned to be at liberty to set off what was due upon the note against the debt due to *Ann Stephens* from the bankrupts; and Lord *Eldon*, upon the ground of the fraud practised upon *Ann Stephens*, restrained the assignees from proceeding at law, and ordered the amount of the note to be set off against the demand *Ann Stephens* had upon the bankrupts, on account of the sum charged as invested in the purchase of navy annuities. (a) But, generally speaking, the rule of law, that joint and separate debts cannot be set against each other, prevails in equity. Therefore, a debtor to one partner individually is not entitled to have the debt due from him deducted from or set against a demand which he has upon the firm, whether the debt due from him, when paid, is to be applied in satisfaction of the claims of joint or of separate creditors. If the money be wanted for payment of separate creditors, he clearly has not a right to retain; and he is equally destitute of such a right, if it be intended to apply the money in discharge of the demands of joint creditors. In the latter case he is not called upon to pay his debt, in the same character in which he would receive, as a joint creditor. His right is not co-extensive with his obligation. His obligation is to pay the whole: his right is to receive only a part, namely, his proportionate dividend with the other joint creditors. (b) There are,

(a) *Ex parte Stephens*, 11 Ves. 24. On the above case being subsequently quoted as an authority, Lord *Eldon* observed, "There are certain difficulties in the decision of *Ex parte Stephens*, which perhaps the strong circumstances of fraud in that case could alone have obviated." *Ex parte Blagden*, 2 Rose, 251. S. C. 19 Ves. 467.

(b) *Addis v. Knight*, 2 Meriv. 117. And see *Stephenson v. Chiswell*, 3 Ves. 566. *Lanesborough v. Jones*, 1 P. Wms. 325. Bac. Abr. tit. Bankrupt (G).

however, cases which militate against the general principle, and in which separate have been allowed to be set against joint debts. In a case before Lord *Hardwicke* (a), the petitioner, who was a creditor under a separate commission against A, and a debtor under a joint commission against A and B, prayed that an action brought by the assignees for the debt he owed to the joint commission might be stayed, and that his demand upon the separate estate might be allowed as a set-off against the debt he owed to the joint estate: the Lord Chancellor doubted whether the debt could be set off under the statute relating to mutual debts, because different persons were concerned in one debt and in the other, and in distinct rights; but as the petitioner's case appeared to be a hard one, he referred it to the commissioners to see how much the petitioner owed to the joint estate, and how much was owing to him from the separate estate, and directed them to certify the same to him; and he stayed the action, and reserved further consideration until the commissioners had certified. Nothing further appears from the report of this case, which, therefore, can hardly be considered as a direct and positive adjudication of the question; but in a subsequent case (b) Lord *Rosslyn* seems to have treated it as an authority, observing that there could be no purpose in directing the account, but with a view to allow it. In that case a separate commission was taken out against *Shepherd*, one partner, and the solvent partner, *Williams*, paid the joint debts; and a debtor to the partnership, being also a separate creditor of the bankrupt, petitioned to set off his separate debt against the bankrupt's share of the joint debt, and to prove for the residue of his separate debt. The Lord Chancellor granted the petition, and said, that "in equity it would be very hard, where it appeared that all the joint debts were paid, and the other partner was satisfied, and there was a surplus in which he was interested in one moiety, and the indebted partner in the other, if to the extent of that moiety the creditor of that partner could not set off." But the authority of this latter decision has been considerably shaken; Lord *Eldon* in a late case (c) having expressed his disapprobation of it. There, under a separate commission against one partner, a debt was proved by a creditor who was indebted to the partnership in a larger amount, and an action was brought for the dividend.

(a) *Ex parte Edwards*, 1 Atk. 100.

(b) *Ex parte Quinten*, 3 Ves. 248.

(c) *Ex parte Twogood*, 11 Ves. 517.



A petition was presented to stay the action, and to obtain relief by a set-off. Lord *Eldon* observed, “ In the case *Ex parte Quinten* the partnership debts were all paid. I do not quite understand it : but if there are debts which cannot be set off at law, can it be said that all the affairs of the bankruptcy are to be suspended until all the accounts are cleared, in order to see what rights of set-off there may be in the result ? That should have been considered before that case was determined. The consequence will be, that where there are joint and separate debts which cannot be set off against each other at law, in every bankruptcy the proceedings must be suspended till the accounts are taken, and it is seen what the joint estate will pay, and what the separate will pay. Another difficulty, in that case, which I do not understand, is this : the commission was against *Shepherd* alone. *Williams* paid all the partnership debts. Then, if demands were due to both, those demands would be recovered in their names ; and then, if upon the account between them there was a clear surplus to *Shepherd*, that would be part of his general separate estate, to be handed over as such to his assignees, in trust for all his separate creditors ; and would not be left in the pocket of one creditor, who paid that joint debt, but would be divisible, as part of the separate estate, among all the separate creditors. The circumstance, that there was a great number of other separate creditors, was not in the least attended to in that case. If it could be made out that all the separate creditors were paid also, there would be a clear equity, not upon the ground of set-off, but an equity, that, from that moment, *Shepherd's* share would be held for that individual creditor. But if the assignees, who had a right to take the account, were to take that, then it would be in trust, not for that individual creditor, but for all the separate creditors ; whose equity is, that all the joint debts being paid, if there is a surplus, that shall be divided, not according to the individual rights of the creditors, but according to the rights the partners have as between themselves, though that surplus may be constituted by the specific money of the joint debtor who paid to the joint estate. Had not *Williams*, paying the partnership debts, a right, by virtue of the partnership credits, to get those credits into his own hands, to set himself right ? I do not deny that there is a good deal of natural equity in the proposition upon which this petition stands ; but, pursuing it through all its consequences, it would so disturb

all the habitual arrangement in bankruptcy, that I dare not do it." So, where part owners of a ship were jointly indebted to the master, who became a bankrupt, and the bankrupt was indebted to several of the part owners, distinct from the account relating to the ship, Lord *Eldon* held, that the latter could not set off their separate debts against the respective proportions of their debt due to the bankrupt's estate jointly with the other part owners. (a) But where a joint bond was given to a banker by a principal and surety, and the principal was a creditor of the banker on his separate account to an amount exceeding the bond, and the banker becoming bankrupt, his assignees brought an action upon the bond; the principal presented a petition, praying that he might be allowed to set off and prove the balance. Lord *Erskine* made the order, upon the ground that the statute of set-off was passed only to prevent circuitry. That if the bankruptcy had not occurred, a plea of set-off could not have been put in to an action by the banker; but the moment he obtained judgment, the principal in the bond would have brought his action against the banker for the separate debt; and if the surety had paid the joint debt, would have repaid him by the money recovered in that action. That assignees take subject to all equities attaching upon the bankrupt, and as the condition of the bankrupt, if he had remained solvent, would have been as represented, that must be the condition of the assignees. (b) And under particular circumstances, as where there is a clear series of transactions in which joint credit has been given, a joint debt may, in equity, be set against a separate demand. (c)

Although the Court of Chancery is the grand forum for the determination of questions arising in bankruptcy, yet they are not unfrequently agitated in the courts of common law; and it will here be proper briefly to explain in what cases assignees must, either alone, or jointly with a solvent partner, assert the rights of the firm on the behalf of creditors, and likewise the mode and manner in which they must sue. Where all the partners are adjudged bankrupts, and an assignment of their effects is regularly made by the commissioners to certain persons as

(a) *Ex parte Christie*, 10 Ves. 105.

(b) *Ex parte Hanson*, 12 Ves. 346. S. C. 18 Ves. 232., and 1 Rose, 156.

(c) *Vulliamy v. Noble*, 3 Meriv. 618.

assignees, every right of action possessed by the bankrupts vests in the assignees, by relation to the time when the acts of bankruptcy were committed. (a) And assignees, not being restricted by the legislature from bringing actions at law without the consent of the creditors, have the same remedies to recover the joint property with which the bankrupts themselves were invested, and where there is a choice of remedies may adopt that which, in their discretion, they may think proper. (b) But every species of present interest being, by the assignment, divested out of the bankrupts and vested in their assignees, the latter can alone enforce any right or claim which may arise or result in favour of the estate of the bankrupts; and if all or one of the bankrupt partners join in an action with their assignees, as they or he cannot sue, and therefore ought not to be introduced on the record as plaintiffs, the defendant may plead the bankruptcy in bar. (c) And where one only of the partners becomes bankrupt, an action founded on a joint contract, or to recover payment of a joint debt, must be brought by the solvent partner jointly with the assignees of his copartner, who succeed to the state and condition of the bankrupt. (d) Even where two partners have stopped payment, and a commission of bankrupt is taken out against one of them only, a debtor to the firm, who knows of the stoppage, cannot, in an action by the partner who has not been declared a bankrupt and the assignees of the bankrupt partner, refuse to pay money due to them, on the ground that the former may have committed an act of bankruptcy; because, although there may be peril in paying a man who is known to have stopped payment, yet that affords no defence to an action for a debt justly due to him. (e) Formerly, it was necessary for the assignees of the bankrupt partner to have obtained the consent of the solvent partner, before an action could have been instituted in their joint names to recover a debt due to the joint estate; for, had the action been instituted without his express concurrence, he might, by a release, have defeated any claim which the assignees might have had against a joint debtor; and courts of law, as

(a) See *Ex parte Birkett*, 2 Rose, 71.

(b) 2 Black. Com. 485. *Hussey v. Fiddall*, 12 Mod. 324. S. C. 3 Salk. 59.

(c) *Eckhardt v. Wilson*, 8 T. R. 140. See also *Kinnear v. Tarrant*, 15 East, 622.

(d) *Thomason v. Frere*, 10 East, 418. *Graham v. Robertson*, 2 T. R. 282.

(e) *Prickett v. Down*, 3 Campb. 131. S. P. *Franklin v. Lord Brownlow*, 14 Ves. 557. See also *Fuller v. Gibbon*, 2 Cox, 24. 6 Geo. 4. c. 16. s. 84.



we have seen (a), would not have controlled his legal power to release the action, unless a very strong case of fraud were made out. But this legal capacity of the solvent partner to release a joint claim is now restrained, and his actual consent to the instituting an action in his name, jointly with that of the assignees, is no longer requisite. By a late statute (b) it is enacted, "that in any commission against any one or more member or members of a firm, the Lord Chancellor may, upon petition, authorise the the assignees to commence or prosecute any action at law or suit in equity, in the names of such assignees and of the remaining partner or partners, against any debtor of the partnership, and may obtain such judgment, decree, or order therein, as if such action or suit had been instituted with the consent of such partner or partners; and if such partner or partners shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void, provided that every such partner, if no benefit is claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit; and that it shall be lawful for the Lord Chancellor, upon the petition of such partner, to direct that he may receive so much of the proceeds of such action or suit as the Lord Chancellor shall think fit."

Where a joint commission issues against all the partners, and assignees are appointed under it, the assignees, in any action instituted by them in relation to the estate of the bankrupts, must all join, or the nonjoinder will furnish a ground of nonsuit. (c) And a joint commission of bankruptcy, having either a joint or separate operation, according as it relates to the joint estate of the bankrupts collectively, or the separate estate of each bankrupt individually, it follows that the assignees under such a commission may recover either a joint debt due to the firm, or a separate debt due to a single partner. In an action which has for its object the enforcing payment of a joint debt, the assignees must in their declaration disclose a joint title, and must show that they legally represent all and each of the parties to whom, before the bankruptcy, the debt or duty was due. And they must make out a title as assignees of all the bankrupts existing at

(a) See *ante*, p. 61.

(b) 6 Geo. 4. c. 16. s. 89.

(c) *Snellgrove v. Hunt*, 1 Chit. Rep. 71. S. C. 2 Stark. N. P. C. 424. *Aldritt v. Kittridge*, 6 B. Moore, 569. In equity the rule is in some cases relaxed. See *Wilkins v. Fry*, 1 Meriv. 241.

the time of the bankruptcy of each; for if the right of the defendant to the subject matter in dispute was perfect before the completion of their title as assignees, they cannot recover. Thus, where judgment was entered up on a warrant of attorney given by two partners, and a *fiery facias* issued, returnable on the *second* of May. On the *first* of that month the sheriff's officer received from the defendants the money directed to be levied. On the *second* of May one of them committed an act of bankruptcy, and the other on the *fifth*. On the *eleventh* a commission of bankrupt issued, and on the *nineteenth* the sheriff paid over the money to the execution creditor; in an action by the assignees, it was held that he was entitled to retain it, inasmuch as he was not to be considered a creditor having security at the time of the bankruptcy, within the meaning of the proviso in the 6 Geo. 4. c. 16. s. 108., since after payment of the money to the sheriff, the original debt was extinguished, and he no longer retained his character of a creditor of the bankrupts. (a) But the assignees under a joint commission may in the same action include debts due to the partners jointly, and those which are due to each separately; for the whole property being transferred to them under the commission, they are equally the assignees of each, as of all. Therefore, a declaration by the assignees of two partners, bankrupts, containing counts on debts due to them jointly, and counts on debts due to them separately, was held good on demurrer. (b) Where, however, assignees under a joint commission sue on a separate contract, they must describe themselves as the assignees of the single partner with whom the contract was made, without noticing the others. (c) Therefore where A, who was in partnership with B, committed an act of bankruptcy, and afterwards, but before the bankruptcy of B, the sheriff seized goods which had belonged to A and B, under an execution against them; it was held that the assignees of A and B under a joint commission could not, suing as such, recover A's share of the property therein. (d) But where in an action of trover by the assignee of

(a) *Morland v. Pellatt*, 8 B. & C. 722. And see *Notley v. Buck*, *ibid.* 160. *Wymer v. Kemble*, 6 B. & C. 479.

(b) *Graham v. Mulcaster*, 4 Bingh. 115.

(c) *Stonehouse v. De Silva*, 3 Campb. 399. *Harvey v. Morgan*, 2 Stark. N.P.C. 17. S. P. *Per Park J.*, *Hogg v. Bridges*, 8 Taunt. 200.

(d) *Hogg v. Bridges*, 8 Taunt. 200. S. C. 2 B. Moore, 122.

bankrupt partners, the declaration consisted of one count only, in which the possession was stated to be in the partners, and it appeared in evidence, that the greater part of the goods in question belonged to one of the partners only, before the commencement of the partnership, and had never been brought into the partnership fund, but it was proved that the residue of the goods was part of the joint estate, Lord *Kenyon* ruled that the plaintiff, under that declaration, was entitled to recover the value of such goods only as had been proved to have belonged to both the partners as partners; although had there been a count in the declaration stating the possession in the assignee, the whole might have been recovered, inasmuch as the commission was joint, and the assignment under it passed both separate and joint effects. (a) If there has been any promise to the assignees, or cause of action since the bankruptcy, a count adapted to such demand should be inserted in the declaration; and where two partners became bankrupts, and the defendant, between the two acts of bankruptcy, received money jointly belonging to them from their clerk, and the assignees of the two partners, in their action to recover it, declared only for money had and received to the use of the two partners before they became bankrupts, and in another count to the use of the plaintiffs as assignees, it was decided that the plaintiffs could not recover, because they should have declared in one count for money had and received to their use as assignees of the partner who had committed an act of bankruptcy at the time the money was paid. (b)

Where a joint commission has not been awarded against a bankrupt firm, but separate commissions have alone issued against each of its members, as the joint estate and consequent right of sustaining an action in respect of it is centred in the assignees of all the bankrupts jointly, it follows that they must all join in an action to recover a joint demand. (c) In such a case it is only necessary, that the assignees who appear as plaintiffs on the record should represent all the persons interested and should unite in themselves all the interest of those parties. Therefore, where there was a firm consisting of three partners,

(a) *Cock v. Tunno*, cited 2 Selw. N. P. 1316.

(b) *Smith v. Goddard*, 3 Bos. & Pul. 465. It may be doubtful whether any form of declaration would entitle the assignees to recover in such a case. See *ante*, p. 307.

(c) *Hancock v. Haywood*, 3 T. R. 433.



two of whom being engaged in partnership with two others, the four became bankrupts, and a joint commission being issued against them, a separate commission was afterwards awarded against the third partner in the firm of the three, under both which commissions the plaintiffs were elected assignees, it was held that, inasmuch as the entire rights of the three vested in them, they might declare as their assignees. (a) And even where the plaintiffs sued and declared as assignees of A and B, and also as assignees of C, for a joint demand due to all the bankrupts, the declaration was holden good on a motion in arrest of judgment. (b) Where separate commissions issue against the several partners, and different persons are appointed assignees under them, although they must all join in an action to recover a joint demand, yet they cannot sue as joint assignees, but must state their several and respective interests in the declaration. (c) And the assignees of A, a bankrupt, and also of B, a bankrupt, under separate commissions, cannot recover in the same action a joint debt due from the defendant to both the bankrupts, and also separate debts due to each, because the bankrupts themselves could not have joined in bringing one action for their separate debts, and therefore the joinder of the two causes of action by their assignees is improper; but if in such an action, the jury have assessed the damages severally on the separate counts, the court will arrest the judgment on those counts only which demand the debts due to each bankrupt separately. (d) The assignees of one of the partners cannot maintain trover against the executor of the solvent partner, for goods delivered to him during the life of the solvent partner, although after the act of bankruptcy upon which the commission issued, because the representatives of the solvent partner and the assignees of the bankrupt are tenants in common. (e) And, for the same reason, where joint effects are delivered by the solvent partner to

(a) *Scott v. Franklin*, 15 East, 428.

(b) *Streatfield v. Halliday*, 3 T. R. 779.

(c) *Ray v. Davies*, 2 B. Moore, 3. Probably, on motion in arrest of judgment after verdict, such an omission would have been holden good, as, according to *Streatfield v. Halliday*, there would have been nothing to shew that the assignees did not claim under a joint commission against all the partners.

(d) *Hancock v. Haywood*, 3 T. R. 433. recognised by Lord *Ellenborough* in *De Cosson v. Vaughan*, 10 East, 65. See also *Richardson v. Griffin*, 5 Mau. & Selw. 297.

(e) *Smith v. Stokes*, 1 East, 363.

a joint creditor, the assignees of the bankrupt cannot, after the death of the former partner, sustain an action of trover against such creditor, notwithstanding the delivery be over-reached by the act of bankruptcy. (a)

The Lord Chancellor exercises a discretionary power to *supersede a commission of bankruptcy* in the case of partners as well as others, if from the circumstances of the case he shall deem it necessary or proper. Therefore, if the petitioning creditor's debt be insufficient (b); or if he be an infant, and therefore incapable of giving the bond to the great seal (c); or if there is not sufficient evidence of the trading, or of the act of bankruptcy; or if the commission be not proceeded in for a length of time, and the delay be not occasioned by the bankrupt himself against the will of the petitioning creditor (d); or if the bankrupts are not described in the commission according to their legal or known description (e); or if the party against whom the commission is directed be a feme covert, and it be founded upon a trading prior to her marriage (g), or be an infant (h), or a lunatic (i), or an uncertificated bankrupt (k), or if one of the partners be dead at the time of issuing the commission against the firm (l); a writ of *supersedeas* under the great seal will, in all these cases, issue to set aside the commission. And formerly, where a joint commission could not be supported as to any one of the partners against whom it was sued out, it was supersedeable against all; but now such a commission may be superseded as to one or more of the partners, without prejudice to its validity against the rest. (m) A commission of bankruptcy against partners may also be superseded before it has been opened, on notice of the application being given to the bankrupts (n), and with the consent of the petitioning creditor (o); or after it has been opened it

(a) *Smith v. Oriell*, 1 East, 368.

(b) But see the 6 Geo. 4. c. 16. s. 18.

(c) *Ex parte Barrow*, 3 Ves. 554. *Ex parte Benjamin*, Buck, 44.

(d) *Ex parte Puleston*, 2 P. Wms. 545. *Ex parte Smith*, 1 Rose, 332. *Ex parte Fletcher*, *ibid.* 454. *Harrison's case*, 3 Ves. & Bea. 174. *Ex parte Luke*, 1 Glyn & James, 361.

(e) *Ex parte Beckwith*, 1 Glyn & James, 20.

(g) *Ex parte Mear*, 2 Bro. C. C. 266.

(h) See *ante*, p. 261.

(i) *Ibid.*

(k) *Ibid.*

(l) *Ante*, p. 266.

(m) 6 Geo. 4. c. 16. s. 16.

(n) *Anon.* 1 Glyn & James, 23.

(o) *Ex parte Trigwell*, 1 Ves. & Bea. 348; and see *Ex parte Law*, 4 Madd. 273.

may be superseded at any time after the second meeting (*a*), with the consent of all the creditors who have proved their debts at the time the application for a *supersedeas* is made (*b*), provided the bankrupts have duly surrendered (*c*), and are not under commitment for not answering to the satisfaction of the commissioners. (*d*) Upon a petition by the bankrupts to supersede a commission, the Lord Chancellor generally directs an issue to try the bankruptcy. (*e*) But where the commission plainly appears to be taken out fraudulently or vexatiously (*g*), or it is manifestly invalid, the court will order it to be superseded upon a petition by the bankrupt for that purpose, without directing an issue or an action, notwithstanding the petitioning creditor is desirous to try its validity. (*h*) A commission being superseded, it is as if it had never existed, and the persons against whom it was directed are restored to all the rights they antecedently enjoyed. Although there is nothing express to be found upon the subject in the books, there can be little doubt that the partnership, suspended by the commission, will be re-established upon its original footing, and that the partners will continue to possess the partnership effects, and to carry on the partnership trade, according to their previous agreement, and subject to the rules of law we have formerly investigated. (*i*)

(*a*) See general order, 21st August, 1818, 3 Madd. 392.

(*b*) *Ex parte* Duckworth, 16 Ves. 416. And see *Ex parte* King, 2 Ves. jun. 40. *Ex parte* Jackson, 8 Ves. 533. *Ex parte* Crisp, 1 Atk. 134.

(*c*) *Ex parte* Jones, 11 Ves. 409. *Ex parte* Roberts, 1 Madd. 72. *Ex parte* Wilkinson, 1 Glyn & James, 387. But see *Ex parte* Brown, 2 Swanst. 290.

(*d*) *Ex parte* Bean, 17 Ves. 47. *Ex parte* M'Gennis, 18 Ves. 289.

(*e*) *Ex parte* Wilson, 1 Atk. 218.

(*g*) *Id.* *ibid.*

(*h*) *Ex parte* Gallimore, 1 Madd. 67.

(*i*) See Wats. on Partn. 357.



## SECTION IV.

*The Consequences of a Dissolution by Death.*

WE will now endeavour to explain the consequences which ensue the dissolution of a partnership firm by the death of one of its members; and these may be arranged under several heads. They may be considered, first, as they relate to survivorship; secondly, as they affect suits between the surviving partner and the representative of the deceased; thirdly, as they apply to suits either by the survivor against third persons, or by third persons against him; and lastly, as they regard proceedings against the assets of the deceased partner.

We have stated in a former part of this work (a), that, for the benefit of trade and commerce, in order that the fruits of each person's labour and industry should descend to his children and family, stock used in a joint undertaking by way of partnership in trade is always considered as common, and not as joint property, and consequently that there is no survivorship therein. *Jus accrescendi inter mercatores pro beneficio commercii locum non habet.* (b) And in an old case (c) it was said by the Lord Keeper, "The custom of merchants is extended to all traders to exclude survivorship." As it is not necessary, therefore, to provide against the right of survivorship, which in other cases would attach, it follows that on the death of one partner, his representatives become tenants in common with the survivor of all the partnership effects in possession. But with respect to *choses in action*, survivorship so far exists at law, as that the remedy or right to reduce them into possession vests exclusively in the survivor; although, when they are recovered, the survivor is regarded barely in the light of a trustee, and the representatives of the deceased have, in equity, the same right of sharing and participating in them which their testator or intestate would have possessed had he been living. (d) So, with respect to real estate, we have seen (e) that where it is purchased with the partnership

(a) See *ante*, p. 31.

(b) Co. Litt. 182. a.

(c) *Jeffreys v. Small*, 1 Vern. 217. See also *Annand v. Honiwood*, Ca. in Cha. 129.

(d) *Martin v. Crompe*, 1 Ld. Raym. 340.

(e) *Ante*, p. 34.

funds, and for partnership uses, it is, on the death of any of the partners, to be treated as a chattel interest, and that it does not descend according to the rules of the common law; for, notwithstanding former decisions to the contrary (*a*), it appears now to be settled that the mere fact of a joint purchase of land for the purposes of a partnership, is of itself sufficient to change the nature of the property, so as, on the death of any one of the partners, to render it distributable in the same manner as the shares of the partnership in the personal stock. (*b*) And where a partner, since deceased, contracted in his own name for a lease of premises to be employed in the partnership trade, the Court of Chancery restrained his representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner. (*c*)

It seems to be doubtful whether the *goodwill* of a *commercial trade*, carried on in partnership, *survives*, or forms a portion of the partnership stock. Lord *Rosslyn*, on the one hand, has determined (*d*) that in such a case the goodwill of a trade carried on without articles survives, and is not to be considered partnership stock to which the representatives of a deceased partner have any right. On the other hand, Lord *Eldon* has expressed his doubts of the propriety of that determination, considering it difficult to draw any solid distinction between the lease of the partnership premises, which is clearly a part of the joint stock, and the goodwill, which consists in the habit of the trade being conducted on those premises. (*e*) But whatever doubts may, in this respect, exist as to the good-will of a mercantile trade, a very intelligible

(*a*) *Thornton v. Dixon*, 3 Bro. C. C. 199. *Balmain v. Shore*, 9 Ves. 500.

(*b*) *Townsend v. Devaynes*, Mont. on Partn. in notes, p. 67. *Selkrig v. Davies*, 2 Dow. P. C. 242. And see *ante*, p. 35.

(*c*) *Alder v. Fouracre*, 3 Swanst. 489. One of the objects of the bill, as originally framed, was to restrain the landlord from granting a lease to the representatives of the deceased partner; but Lord *Eldon* observed, that as the contract was with the deceased alone, unless there was evidence that the landlord knew that it was made on behalf of the partnership, the surviving partner had no equity against him, and that the landlord could not in such a case be compelled to grant a lease to the survivor.

(*d*) *Hammond v. Douglas*, 5 Ves. 539.

(*e*) *Crawshay v. Collins*, 15 Ves. 227. If partners become bankrupts, the goodwill of their trade passes to their assignees, who may sell it for the benefit of the creditors. Such a sale, however, will not operate to prevent the partners setting up the same trade again, and in the same place. *Crutwell v. Lye*, 17 Ves. 335. S. C. 1 Rose, 123.

distinction has been suggested between a commercial and a professional association. Sir *John Leach* has intimated, that where a partnership is formed between professional persons, surgeons for instance, and one dies, it would be difficult to maintain that the other is obliged to give up his business, and sell the connexion for the joint benefit of himself and the estate of his deceased partner. His honour added, that when such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and where the determination is occasioned by the death of one, the right of the survivor cannot be affected. (a)

It has before been observed, that a partner cannot by will leave his interest in the business to a legatee, nor has the executor or administrator of a deceased partner any claim to be admitted a partner. (b) It is usual, however, in articles of partnership, to provide for that contingency; and by special agreement, one or all of the partners may severally secure the reversion of their interest in the partnership business to their representative or assignee. (c) But a surviving partner cannot, under any circumstances, refuse to admit a legatee, if he himself claims any benefit under the will. (d) And where the deed of partnership stipulates to permit the personal representative, or any other nominee of a deceased partner to become partner, it is of course only optional, and not imperative on them to become such partners; and although they will be entitled to a reasonable time to inspect and examine the accounts, yet they cannot insist on having the accounts taken before electing to become partners. (e) In the event of their refusal to succeed the testator on the terms of the partnership, the death puts an end to the concern, but not upon a dissolution wrought by exclusion of the appointees, for they never become partners. (g) Where a partner, having a power to nominate a person to succeed him, by will directed his executors to carry on the trade, and bequeathed to them his share of the capital, with a power to dissolve the partnership, or nominate any other person to succeed him or them, and by a codicil he desired that if his

(a) *Farr v. Pearce*, 3 Madd. 74.

(b) *Crawshay v. Maule*, 1 Swanst. 509.

(c) *Pearce v. Chamberlain*, 2 Ves. 33. *Godfrey v. Browing*, cited *ibid.* *Balmain v. Shore*, 9 Ves. 500.

(d) *Crawshay v. Maule*, *supra*.

(e) *Pigott v. Bagley*, 1 McClelland & Younge, 569.

(g) *Kershaw v. Matthews*, 2 Russ. 62.



executors continued the trade, and his grandsons attained twenty-one, his executors, or the survivor of them, would nominate them partners in his place, and bequeathed to his grandsons a certain sum a-piece, payable out of the profits of the trade, so soon as they became partners, but directed such legacies to sink into the estate, if the grandsons died before twenty-one, or declined the partnership. In another codicil he expressed himself thus:—"It shall be entirely in the discretion of my executors, whether to appoint D. (one of the grandsons) to be a partner or not, any direction in my will or codicil to the contrary notwithstanding; and if they do not think proper to appoint him, the legacy given to him to be void." Both grandsons having attained twenty-one, commenced a suit in equity against the executors, to be admitted partners from the time they attained that age, for an account of the profits from that period, and for payment of their legacies. One of the executors stated, that he had always been desirous for their admission into the partnership, but the other refused under an idea that the terms of the will and codicil were not compulsory. But the court was of opinion, that as there was no declaration by the executors either before or at the time the grandsons attained twenty-one that they were unfit to be admitted, and there was a difference of opinion among the executors upon the subject, the legatees were entitled to the relief they sought in its full extent. (a)

We have seen (b) that, as to future dealings, a partnership is terminated by the death of one of the partners; but although, in that point of view, death *ipso facto* operates as a determination, yet a partnership cannot to all intents and purposes be said to be dissolved by death. The representatives of a deceased partner are not strictly partners with the survivor; but still that community of interest subsists between them which is necessary for the winding up of the affairs, and which requires that what was partnership property before, shall continue so for the purpose of distribution according to the rights of the partners. (c) This event generally is, and ought always to be, contemplated and provided for in the articles of partnership. Positive cove-

(a) *Wainwright v. Waterman*, 1 Ves. jun. 311.

(b) See *ante*, p. 219.

(c) *Ex parte Williams*, 11 Ves. 5. *Wilson v. Greenwood*, 1 Swanst. 480. S. C. 1 J. Wilson, 223. *Crawshay v. Maule*, 1 Swanst. 506. S. C. 1 J. Wilson, 181. *Beak v. Beak*, 3 Swanst. 627. *App.* *Vulliamy v. Noble*, 3 Meriv. 614.

nants between the parties as to the continuing of the business, the distribution of the property, and the settlement of accounts, upon such a contingency, often prevent a great deal of confusion, hardship, and injustice. In the absence of express negative stipulation, the executor has a right to insist upon the application of the joint property to the payment of the joint debts, and a division of the surplus (*a*); and if, within a reasonable time, the survivor do not account with him and come to a settlement, a court of equity will grant an injunction restraining him from disposing of the joint stock, and from receiving the outstanding debts. (*b*) So the surviving partners have equally the power of insisting that the partnership accounts shall be finally taken, and the joint affairs wound up. But to a suit by them for that purpose, the personal representative of the deceased partner is a necessary party; for as the accounts to be adjusted relate to partnership dealings, which took place during his lifetime, and the adjustment of which must affect his personal estate, his executor or administrator has such an interest in the question that he will not be concluded by any decree made in his absence. It may happen, however, that no person filling the character of legal personal representative exists; but where that is the case, the ecclesiastical court will, on the refusal of the next of kin after citation, grant a limited administration to a person nominated by the surviving partners, if such a grant is shown to be essential to the due prosecution of the suit. (*c*) In a late case it was determined that the executor of a deceased partner could not file a bill against the surviving partners and the assignees under a commission of bankruptcy issued against them, charging that the commission was concerted, and praying for an account against the survivors, or if the commission was valid, that he might prove for what was due, on the ground that the proper course to im-

(*a*) *Ex parte Ruffin*, 6 Ves. 126. Where by the articles of partnership for a term of seven years, it was provided that on the death of any one, the concern should be carried on until the end of the term, as if he had been living, for the joint benefit of the surviving partner and the representatives of the deceased, and then the stock should be divided according to the respective interests; it was held, that as the articles could not be literally performed by the division of the property and interest in continuing contracts, the settlement could only be by a sale of the whole, and division of the proceeds. *Cook v. Collingridge*, 1 Jac. 607.

(*b*) *Hartz v. Schrader*, 8 Ves. 317.

(*c*) *Cawthorn v. Challi *, 2 Sim. & Stu. 127.

peach the validity of the commission was by petition in the bankruptcy, and not by bill. (a)

When a suit is instituted for an account of the partnership stock, the principal question is, in what manner the accounts are to be taken, so as to produce a final arrangement. They may be taken in various ways: the distinction, however, is, that where there is not a special agreement directing the mode in which the accounts shall be adjusted, they must be taken in the way ordinarily adopted by a court of equity; but where a special agreement has been made relative to their adjustment, it will be abided by, and be acted upon as furnishing the rule by which the adjustment is to be governed, provided the parties themselves have observed it. (b) The right possessed by partners of determining *inter se* the mode and manner in which the accounts shall be settled on their deaths respectively is necessarily unrestricted, and whatever course may be agreed upon, it must form the basis of any settlement between the representatives of the deceased and the surviving partner. Partners may lawfully stipulate, by the articles of partnership, that the accounts shall be made up annually, and that if any error shall happen to be made in stating them, it shall be rectified during the lifetime of both parties; and where there is such a stipulation, an account settled during their lives will, notwithstanding error, be conclusive after their deaths. (c) But if the articles themselves prescribe the mode in which the accounts are to be adjusted, and the partners for several years not only do not adhere to them, but engage in business to which their application would work injustice, the executors of a deceased partner will not be entitled to insist upon the account being taken in conformity with the stipulations contained in them. Thus, where three persons, on entering into partnership as ship agents and insurance brokers, stipulated in the articles for an annual settlement of accounts, and for payment to the representatives of a deceased partner of an allowance, in lieu of profits since the last annual account, proportioned to the amount of his share of profits during two years preceding, and the partners, afterwards engaging in the exportation of goods on their joint account, the returns of which could not be ascertained at the

(a) *Bailey v. Vincent*, 5 Madd. 48.

(b) *Jackson v. Sedgwick*, 1 Swanst. 469.

(c) *Gainsborough v. Stork*, Barnard. 312.



limited period, omitted for several years to settle annual accounts, it was determined that the stipulations in the articles were waived in equity; and an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners, for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained. (a) So, where the articles provided that there should be a yearly adjustment of the accounts upon a certain day in *March*, and that in case of the death of either, he should not be entitled to any interest in the concern from the date of the last yearly settlement; the previous last annual adjustment having taken place in *November* preceding the death of one of the partners in *February*, it was held that his representatives were entitled to the profits up to that day. (b) The account, where the articles do not prescribe the manner in which it is to be taken, or the provisions respecting its adjustment have been waived, must, according to the practice of a court of equity, commence with the last stated account; and if there be not any stated account, it must be taken from the time of the commencement of the partnership. (c) In taking the account, profits accrued after the death of one partner are considered as an accession to the capital, and as joint property: for though a partnership is *ipso facto* determined by the death of a partner, yet if the surviving partners carry on the trade with the capital of the deceased, instead of converting the assets, and coming to a settlement with the executors, the latter are entitled to a rateable share of the profits during the time that the capital has been so employed, partners being under an implied obligation "to use the joint property for the benefit of all whose property it is;" (d) the account, therefore, is to end with the state of the stock at the time of the death of the partner,

(a) *Jackson v. Sedgwick*, 1 Swanst. 460; and see *Geddes v. Wallace*, 2 Bligh, 270.

(b) *Petty v. Janeson*, 6 Madd. 146.

(c) *Beak v. Beak*, Finch, 190. Where the object of a suit is not only to have a partnership, but other distinct accounts taken, the decree referring it to the master should expressly direct him to take the account of the partnership; for it seems to be a rule in the offices of the masters, not to take a partnership account, unless particularly directed to do so. *Woolley v. Gordon*, 1 Tamlyn's Rep. 11.

(d) *Brown v. Litton*, 1 P. Wms. 140. *Hammond v. Douglas*, 5 Ves. 539. *Hill v. Burnham*, and *Coxwell v. Bromet*, cited 15 Ves. 220, 223. *Brown v. De Tastet*, 1 Jac. 284.

and the proceeds thereof until it is got in. (a) But an allowance will be made to the surviving partner for his management of the trade, where he carries it on for the joint account without any obligation to do so under the partnership deed (b); although where the trade is continued in pursuance of an agreement in the copartnership articles, which contains no provision for an allowance to the survivor for his trouble in managing the concern, he is not in a situation to claim any allowance. (c)

When an infant or other person becomes entitled to the share of a deceased partner, and the share is continued in the trade either in the case of the intestacy of the deceased, or of his testacy without an express direction in the will to that effect, the party entitled has the option of taking either the interest, or the profits that have arisen from the use of the capital. But, inasmuch as the principle of the option given is, whether the party will or not elect to ratify the employment of the capital, if he do so elect, he cannot *ad libitum* take interest or profits for different periods, but must abide by his election for the whole period. Circumstances may, indeed, arise to entitle him to divide his election, and to take profits for one and interest for another part of the period, as if the property were subsequently embarked in a new trade, or at a different place, or in adventures substantially new at the same place; but, in all cases, a decree will be made, directing an inquiry, whether the account of interest or of profit is most advantageous, and the option will be given for the larger sum. (d) So, where A, B, and C, carried on business as bankers in partnership, and were interested in the profits and losses of such banking concern respectively, as follows: A for five-twelfths, B for two-twelfths, and C for five-twelfths; a commission of bankruptcy was awarded against them, but the full amount of the joint and separate debts of the bankrupts, with interest, was paid. To complete such payment, real estates of great value, belonging to A were sold by the assignees, and on the whole A contributed

(a) *Beak v. Beak*, Finch, 190. A sale of the share of the deceased by his executor to the partners, for the purpose of being resold to him, has been held void, and his estate entitled to the portion of the profits, as if his interest in the partnership still continued. *Cook v. Collingridge*, 1 Jac. 607.

(b) *Brown v. De Tastet*, 1 Jac. 284.

(c) *Burden v. Burden*, 1 Ves. & Bea. 170. where, under such circumstances, the survivor *bonâ fide* incurs expenses on the erroneous supposition that he is sole owner of the business, in the taking of the account he will be allowed a moiety. *Id. ibid.*

(d) *Heathcote v. Hulme*, 1 Jac. & Walk. 122.

considerably beyond his proportionate share of the losses of the firm. Part of the said estates were sold during the life of A; part were contracted to be sold, but not sold, at the time of his death; and the remainder were sold since his death, and a surplus remained in the hands of the assignees: it was determined, that the heir of A, as such, had no claim in respect of the estates of A sold in his lifetime, the same being converted out and out, and the produce must be taken as it was found; but that the surplus monies in the hands of the assignees, to the amount of the produce of the estate sold after the death of A, belonged to the heir at law, with four per cent. interest, unless rents and profits were claimed. (a)

The surviving partner having at law the right to the custody, care, and management of the joint estate, a court of equity will not, generally speaking, on a bill being filed against him for an account of the partnership transactions, deprive him of his legal right by appointing a *receiver*; because, notwithstanding the death of one, the confidence in the other partner remains. (b) But if he be guilty of such acts of mismanagement and improper conduct as satisfactorily establish that he cannot safely be intrusted with the joint estate, the court will then exercise its power, and will appoint a receiver to collect in the debts, and dispose of the property. (c) And where, upon a bill for a discovery and an account, it appeared that there were many outstanding debts, and that the surviving partner was carrying on a distinct trade with the debtors to the joint estate, and forbore to call upon them for payment of the joint debts, the court directed that a receiver should be appointed unless the survivor, within a limited time, gave security for payment of a moiety of the amount of the debts. (d) But if both partners are dead, and the representatives of the one institute a suit for an account against the representatives of the other, the court will, as a matter of course, grant a receiver; for the confidence which subsisted during the lives of both, and continued after the death of a single partner, ceases with the death of the survivor and does not extend to his representatives. (e) A court of equity will not, on the application of the executor of a deceased partner, restrain the surviving partners from using the name of the deceased in the

(a) *Banks v. Scott*, 5 Madd. 493.

(b) *Philips v. Atkinson*, 2 Bro. C. C. 272; and see *Hartz v. Schrader*, 8 Ves. 317.

(c) *Philips v. Atkinson*, *supra*.

(d) *Estwick v. Coningsby*, 1 Vern. 118.

(e) *Philips v. Atkinson*, *supra*.



firm of their trade; because, by continuing his name in the partnership firm, no liability can be entailed upon his estate, and although it may be a fraud upon the public, yet that circumstance will not entitle the executor to an injunction. (a)

Where the executors of a deceased partner, filing their bill for an account, have got all the partnership books and accounts, the defendant regularly ought to file a cross bill for an account and discovery. (b) But if he states, by his answer, that the bill calls for a discovery, which he cannot make completely without seeing the partnership books and accounts, and that he verily believes those books and accounts (to the joint possession of which both partners were entitled) are in the hands of the plaintiffs, the court, although it will not order the accounts to be produced, will on motion stay proceedings, for want of a sufficient answer, until he has been assisted with an inspection. (c) And in such a case, a relaxation of the general rule is no more than obvious justice requires. (d) When surviving partners claim to be creditors of a deceased partner, in respect of a balance due on his separate account, arising out of distinct transactions with the partnership, it has been held at law that no legal debt exists under such circumstances (e); but nothing is more clear than the right of equitable creditors to be satisfied, where an account has been decreed; and no distribution of assets can take place until the accounts of all the creditors, of every description, have been gone into. The fact that the debtor was a partner in the firm of the creditors, however it may alter the nature of their debt, is of no weight at all with reference to their right to have the accounts taken. (g) And where, on the dissolution of a partnership, one partner, for a valuable consideration, covenants to pay the joint debts, and to indemnify the other partner against them, and the covenantor dies, leaving joint debts undischarged, of which the covenantee is compelled to pay some, the latter may, by a bill in equity, not only reimburse himself out of the assets of the deceased, but may have

(a) *Webster v. Webster*, 3 Swanst. 490. *n.*

(b) *Anon.* 2 Dick. 778. *Wilby v. Pistor*, 7 Ves. 412.

(c) *Pickering v. Rigby*, 18 Ves. 484.

(d) *The Princess of Wales v. Earl of Liverpool*, 1 Swanst. 125.

(e) *Bosanquet v. Wray*, 2 Marsh. 319. S. C. 6 Taunt. 597. And see *ante*, p. 118.

(g) *Paynter v. Houston*, 3 Meriv. 302.

those assets applied in discharge of the remainder of the joint debts. (a)

With respect to *actions either by or against surviving partners*, they differ in no essential particulars from actions brought by or against the whole firm, except in the person by whom in the one case, and against whom in the other, the right in dispute is to be asserted. We have already had occasion frequently to remark that, on the death of one partner, all legal rights and remedies appertaining to the partnership formally vest in the survivor. The right of action must necessarily survive; otherwise, according to the technicalities of law, there would be a failure of justice; for the rights of the executor and of the survivor being of several natures, if they joined in the same suit there consequently must be several judgments, which in a single action is not allowed. (b) Substantially, however, the right of the representatives of the deceased is not varied by this legal anomaly; for, there being no survivorship in point of interest, the instant any joint *chose in action* is reduced into possession by the legal process of the survivor, the right of the representatives to their distributive proportion attaches. (c) So with respect to joint contracts entered into by a firm, and from which a joint legal responsibility results, it can at law, after the death of one partner, be enforced against the survivor alone, and finally against the representatives of the last survivor (d); for the law considers partnership contracts, which are joint in form, as producing only a joint obligation, which, on the death of one, attaches exclusively upon the survivor. (e) Indeed the reason which has been advanced as operating to prevent personal representatives from asserting, jointly with the survivor, a right resulting to the partnership firm, applies with undiminished force, if a right accruing to a stranger from the firm should be attempted to be enforced against them and the survivor. Executors or administrators, if legally responsible, could only contract such a responsibility by the assumption of their representative characters; and it therefore follows, that they could

(a) *Musson v. May*, 3 Ves. & Bea. 194.

(b) *Kemp v. Andrews*, Carth. 170. S. C. 3 Lev. 290. 1 Shaw, 188.

(c) *Id. ibid.* *Martin v. Crompe*, 1 Ld. Raym. 340.

(d) *Calder v. Rutherford*, 3 Brod. & Bingham 302.

(e) *Anon.* 1 Mod. 45. *Hyat v. Hare*, Comb. 383. *Smith v. Barrow*, 2 T.R. 470.

only be charged *de bonis testatoris*, whereas the surviving partner would be liable *de bonis propriis*; so that the judgments must be different, as they applied either to the survivor or to the representatives of the deceased partner. And little inconvenience arises from the present rule, for, notwithstanding the surviving partner is liable for the whole debt in the first instance, he can call upon the executor of his copartner for a contribution; nor is there any hardship upon the creditor, since, in the event of the insolvency of the surviving partner, we shall presently see that he has a remedy in equity against the estate of the deceased.

Although, by the death of one partner, a *joint debt or duty is extinguished in law*, as far as regards the enforcing it against his representatives or his estate, yet a *court of equity* has, upon general principles, laid down, that there shall be a recourse against the *assets of a deceased debtor*. At law, a partnership contract is joint only; but equity, adopting the law-merchant to its full extent, holds it to be both joint and several: indeed, were the surviving partner, who ought in the first instance to be called upon to pay, not capable of answering the demand, it would, notwithstanding the legal claim is dissolved, be inconsistent with equitable notions that the estate of the deceased partner should remain solvent without satisfying the joint engagements. (a) It was formerly matter of doubt with Lord *Thurlow*, whether the representative of a deceased partner could be sued in equity (b); but it is now completely settled, on the presumption of insolvency in the surviving partners, that the deceased partner's estate remains liable, until the debts which affected him at the time of his death have been fully discharged. (c) And this equitable doctrine seems to have been carried so far as to have enabled the joint creditors, subject only to the right of priority in respect of debts of a superior degree, to come in upon the separate estate of the deceased *pari passu* with separate creditors, on the ground that a decree for payment of debts, when obtained, operated as much

(a) *Lane v. Williams*, 2 Vern. 277, 292. *Gray v. Chiswell*, 9 Ves. 125. See also dictum of Lord *Hardwicke* in *Primrose v. Bromley*, 1 Atk. 90.

(b) *Hoare v. Contencin*, 1 Bro. C. C. 27.

(c) *Vulliamy v. Noble*, 3 Meriv. 619. And see *Newland v. Champion*, 1 Ves. Sen. 105. *Stephenson v. Chiswell*, 3 Ves. 566.



for the benefit of the joint as of the separate creditors. (a) But Lord *Eldon*, considering that the accident of death ought not to place the joint creditors upon a better footing, as against separate creditors, than they would have been placed in had the party lived and become a bankrupt, limited this equitable right, and determined that, as in bankruptcy, the joint creditors could only claim the surplus of the separate estate of the deceased after satisfaction of the separate debts. (b) But subject to this limitation alone, which obvious justice to the separate creditors required should be interposed, joint creditors, whose claims were consummate in the lifetime of all the partners have an indisputable right of resorting against, and of having their demands satisfied out of the assets of a deceased partner. And those assets will be an available fund to joint creditors in all cases in which the deceased, had he been living, would have been liable *quá* partner; and, therefore, notwithstanding the claims, sought to be enforced, may have arisen out of a fraudulent misappropriation, by one partner, of funds or securities intrusted by the creditors of the firm, yet if the deceased was instrumental to the misappropriation, or if (he not being privy to it) the firm, of which he was at the time a member, was benefited by an application to its use of those funds or securities, or their produce, his estate will be liable to make good the losses which the creditors may have sustained. Thus, in a late case, where a creditor deposited exchequer bills with a partnership firm, without giving any power or authority to sell or dispose of them, but they were afterwards sold, and the produce applied to the use of the partnership, it was decided that the estate of a deceased partner, in whose lifetime the sale took place, was responsible in respect of this breach of trust, notwithstanding he was not actually privy to the sale. (c) So where the customer of a banking firm (knowing that an individual partner took into his own hands, for the convenience and as the act of the firm, the general management both of stock in the public funds belonging to the house, and of that intrusted to it by their customers,) appointed them his agents to purchase stock on his

(a) *Burn v. Burn*, 3 Ves. 573.

(b) *Gray v. Chiswell*, 9 Ves. 118. In a creditor's suit for administering the assets of B, a joint creditor of A & B has been permitted to prove, it appearing that A had become bankrupt, and that there were no joint assets. *Cowell v. Sike*, 2 Russ. Ch. C. 191.

(c) *Clayton's case*, 1 Meriv. 575.

account, and to receive the accruing dividends ; and some stock being bought, it was invested in the name of the individual partner who afterwards, but in the lifetime of a deceased partner, sold it, and applied the proceeds to the use of the partnership ; it was held that the customer was entitled, as against the estate of the deceased, to consider it as a debt, or to have the stock specifically replaced at his option. (a) And where stock has been transferred, as a collateral security, to a partnership, under an express agreement, that no part of the stock should be sold without notice ; although the account of the party who made such transfer may be considerably overdrawn, it will be a fraud to sell the stock, without notice, and apply the produce to the use of the partnership ; continuing to treat the stock as unsold, and giving the transferer credit for the dividends : and, supposing this fraud to have been practised in the lifetime of a partner, who dies before its discovery, his estate (whether he was or was not privy to the transaction) remains liable to replace, specifically, the whole stock sold, and not merely the balance due, after giving credit to the partnership for the sums overdrawn. (b) So, where it has been the habit of partners in a banking house to take transfers of stock, as a security for advances made to their customers under an obligation that the stock so taken should remain in their hands as a security only, not to be dealt with except by the authority of the person making each several transfer ; if the banking house, in fraud of the agreement, sell out the stock, and apply the produce to partnership purposes, the assets of a deceased partner will be liable, so far as the fraudulent conversion took place during his lifetime. If part of the stock so sold has subsequently been replaced, this will be esteemed such an appropriation as, upon the bankruptcy of the partnership, will entitle the party or parties who made the transfer to a specific *lien* on the stock repurchased, which will be deemed to have a sort of “ ear-mark ” in their favour ; and they will, of course, be entitled to prove under the commission for the residue of their debts, as well as to go against the estate of a deceased partner of the banking house to make good any *deficit*. (a) But the liability of the estate of a deceased partner is, of necessity, confined to those claims alone which were consummate at the time of his death ; for it would be the reverse of equity to throw upon it the burthen

(a) Baring's case, 1 Meriv. 611.

(b) Ward's case, *ibid.* 624.

(c) Vulliamy v. Noble, 3 Meriv. 619.

of paying debts, to the contracting of which the deceased could not have been instrumental, and from which his estate could not not possibly have derived any benefit. Besides, the death of a partner of itself works a dissolution of the partnership (*a*); and there is the high authority of Lord *Eldon* for saying, that notice of a dissolution so effected, is not necessary to protect the estate of the deceased from future liability. (*b*) Therefore, where bills were deposited by a customer in the hands of his bankers, who, in breach of their trust, but after the death of one of the firm, sold them, it was determined that the estate of the deceased partner was not answerable, although the customer was ignorant of the fact of his death. (*c*) And where bills have been lodged with a banking house, part of which bills have been fraudulently sold before the decease of one of the partners, and part after his death; the assets of the deceased partner are answerable only for such part of the produce of the bills as were improperly disposed of in his lifetime. (*d*) And notwithstanding joint creditors have an equitable right against the estate of a deceased partner for debts due from the firm at the time of his death, yet they may, by their conduct, manifest an intention of transferring the sole liability to the survivors. What shall be considered a waiver of this right, or in other words, what sort of dealing with the survivors shall, in such cases, operate the discharge of the estate of a deceased partner, appears to be unsettled by decision. Lord *Eldon* has laid down generally that the right standing only upon equitable grounds, if the dealing of a creditor with the surviving partners has been such as to make it inequitable that he should go against that fund, he would not upon general rules and principles be entitled to the benefit of such a demand. (*e*) But to oust the *primâ facie* claim which the joint creditors have upon the assets, it must be shown that their subsequent dealings are of such a nature as to shift the equitable obligation to pay from the estate of the deceased partner; such as clearly and unequivocally demonstrate the intention of the creditors to give credit to the surviving

(*a*) *Crawshay v. Maule*, 1 Swanst. 509. *Gillespie v. Hamilton*, 3 Madd. 251.

(*b*) *Vulliamy v. Noble*, 3 Meriv. 614. On this ground a court of equity will not restrain the surviving partners from using the name of a deceased partner in the firm of the trade. *Webster v. Webster*, 3 Swanst. 490. *n.*

(*c*) *Brice's case*. 1 Meriv. 620.

(*d*) *Houlton's case*, 1 Meriv. 616.

(*e*) *Ex parte Kendal*, 17 Ves. 526.



partners exclusively. A continuation by the creditor of his dealing with the surviving partners, if unattended by circumstances from which his relinquishment of all right against the assets of the deceased can be inferred, will not alone produce the effect of exoneration. For instance, in the case of a banking concern (between which and any other partnership there is no difference in principle as to the equity of the creditor against the deceased partner's estate), a creditor, after the death of one partner, does not, by leaving money in the hands of the survivors, raise a new contract, nor relinquish any benefit resulting to him from his old security. If, therefore, he continue to draw drafts upon the survivors, and act upon their acknowledged liability to the extent that his convenience and occasions may happen to require, he does not thereby release the estate of the deceased; for, although, by the act of drawing upon them, he affirmatively recognises the survivors as his debtors, yet that affirmative act does not negatively show that all others who originally contracted liability are exonerated. (a) So if the creditor continue to deal with the surviving partners, by both drawing out and paying in money, whereby the debt due to him is increased, but never at any time reduced, this does not amount to an acquittal of his claim upon the deceased partner. (b) And in a case in which one of three members of a firm of bankers died, and after his death a new partnership was formed by the surviving partners and other persons; and creditors of the old partnership, for money paid into the bank upon notes payable with interest, received interest upon such notes from the new partnership, who reissued several of the common cash notes of the old partnership, it was determined that the creditors of the old partnership might, upon the bankruptcy of the new firm, proceed against the assets of the deceased partner. (c) And acts done by a creditor, subsequent to the death of one partner, from which an inference might be drawn of his having adopted the surviving partners as his debtors, will not have the effect of exonerating the estate of the deceased from liability for a debt

(a) *Sleech's case*, 1 Meriv. 563. *Gough v. Davies*, 4 Price, 200.

(b) *Palmer's case*, *ibid.* 623. In this case distinct accounts must have been kept, and the money paid by the survivors must in their account have been appropriated in payment of their debt, otherwise the decision is not perfectly reconcileable with that in *Clayton's case*, *post.* See the observation of *Best J.*, in *Simson v. Ingham*, 2 B. & C. 72.

(c) *Daniel v. Cross*, 3 Ves. 277. See also *Jones v. Sutton*, cited *ibid.* 278.

previously incurred to that creditor, by a breach of trust committed by the firm, of which the creditor was at the time ignorant. (a) But if the creditor of a banking firm, after the death of one of the partners, continue to deal as usual with the survivors; and before he pays in any sums of money to his account, draws sums out of the house, and the balance, although it varies from time to time, is upon the whole increased by such subsequent dealings; yet the subsequent payments by the surviving partners will, where the accounts both posterior and anterior to the death of the partner are blended, be taken in reduction of the balance due at the death of that partner, and his estate be held discharged *pro tanto*; because the balance for which alone the deceased partner was liable, being once diminished to any given amount, it cannot, as against his estate, be again augmented by subsequent payments made, or subsequent credit given to the surviving partners. (b) For it is a general rule, that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made, from time to time, by the surviving partners, must be applied to the old debt. (c) But this rule applies only where both accounts are blended, and does not deprive the creditor of his legal right of applying, to the credit of the old, or of a new account, payments made to him, without any application of them by the surviving partners. Indeed, if the general rule were invincible, it might, where the deceased is indebted to the partnership, be productive of this hardship to the surviving partners, that the old debt would be satisfied by their money. The creditor, therefore, where the surviving partners do not make a specific application at the time of payment, has the right of making a rest, and of opening a new account, to which he may ascribe payments made without appropriation after the death of the partner. This was decided in a late case (d), in which a bond was given by country bankers to the several persons constituting the firm of a *London* banking house, conditioned for remitting money to provide for bills, and for

(a) Clayton's case, 1 Meriv. 575.

(b) S. C. Ibid. 585.

(c) Simson v. Ingham, 2 B. &amp; C. 72. Simson v. Cooke, 1 Biagh. 452. Williams v. Rawlinson, 3 Bingh. 76.

(d) Simson v. Ingham, *supra*.

the repayment of such sums, as the *London* bankers might advance, on account of persons constituting the firm of the country banking house or any of them, associated or not with other persons. One of the partners in the country bank died, a considerable balance being then due to the *London* bankers. It was the course of business between the two houses, for the *London* bankers to send to the country bankers monthly accounts of receipts and payments. In the month following the death of the deceased partner, the *London* bankers received sums, in payment, more than sufficient to discharge the balance then due; but, during the same time, they advanced money on account of the country bankers to an equal amount. In the first instance, the *London* bankers entered in their books all receipts and payments made, after the death of the deceased partner, to the account of the old firm, but they did not transmit any account to the country bankers until two months after the death of the deceased partner, and then they transmitted two distinct accounts: one the account of the old firm, made up to the day of the death of the partner; and another, a new account, containing all payments and receipts subsequent to that time. And it was held, that the entries in the books of the *London* bankers did not amount to a complete appropriation by them, of the several payments to the old account, such appropriation not being complete until it was communicated to the party to be affected by it; and, therefore, that the *London* bankers, notwithstanding those entries, were entitled to apply the payments received, subsequently to the death of the deceased partner, to the debt of the new firm. With respect to the time when the creditors should prosecute their demands against the surviving partners, in order to retain their right of resorting to the estate of a deceased partner, no rule of convenience exists which requires them to do it within any assigned or arbitrary limitation. If such a rule were established, it is doubtful whether the estate of a deceased partner would, upon the whole, be much benefited by it; for if creditors were told, that the only way in which they could preserve their recourse against the estate of a deceased partner, was by using all possible diligence to compel an immediate payment, by the surviving partners, of the whole of their balances, there are very few houses which could stand such a sudden and concurrent demand as that would necessarily bring upon them. A firm might be reduced



to a state of bankruptcy, which, in the ordinary course of business, would have been able to fulfil all its engagements; and a demand would be brought upon the estate of a deceased partner, from which it might otherwise have wholly escaped. Expediency, therefore, being taken into the consideration, it is impossible to see what beneficial purpose would be answered by compelling creditors to the rigorous course of exacting payment within a definite period, as the condition upon which alone the hold which equity gives them on the estate of a deceased partner could be retained. (a) It has therefore been held that the equity of a creditor against the estate of a deceased partner is not barred by eight months nonclaim, and an intermediate payment by the surviving partners of part of the debt. (b) The creditors of the surviving partners, if they have themselves no demand against the separate estate of the deceased partner, cannot compel the joint creditors of the survivors (being also legal creditors of the firm, as originally constituted,) to go against the separate estate of the deceased; unless the survivors, if they were solvent, could turn those creditors, suing them, against the estate of the deceased. The equity of the creditors, in such cases, is worked out through the equities which the partners have as between themselves. (c) Where, on a dissolution of partnership, a creditor of the firm gave his security to the outgoing partner, in satisfaction of a debt due to the outgoing partner from the continuing partner; it was agreed between the parties that whatever sums should become due from the outgoing to the continuing partner for business to be done on his account, should be applied in liquidation of the above debt; the outgoing partner died, and his executors recovered against the joint creditor on his security; the continuing partner who survived became insolvent, and the creditor filed a bill against the executors of the deceased and the survivor; and it was ordered that the creditor should have satisfaction from the assets of the deceased, and that the money due from the deceased to the surviving partner for work done since the dissolution, should be set off against the debt originally due from the survivor to the deceased on the dissolution. (d)

(a) Sleech's case, 1 Meriv. 569.

(b) Id. *ibid.* See also *Lane v. Williams*, 2 Vern. 277, 292. *Daniel v. Cross*, 3 Ves. 277.

(c) *Ex parte Kendal*, 17 Ves. 521. *Ex parte Yallop*, 15 Ves. 69.

(d) *Cheetham v. Crom*, 1 McClelland & Younge, 307.

According to the principles of the common law, the creditors of a deceased partner or trader had no remedy against his real assets, which by his death descended to his heir. Even creditors by bond or other specialty, in which the heir was not expressly bound, could not enforce their claims against the assets which the heir might take by descent in fee simple; for as Lord *Coke* has observed (*a*), “the executor doth more actually represent the person of the testator, than the heir doth the person of the ancestor. For if a man bindeth himself, his executors are bound, though they be not named; but so it is not of the heir.” And creditors by specialties which affected the heir, provided he had assets by descent, were, before the statute 3 & 4 Wm. and Mary, c. 14, defrauded of their securities, if the debtor had devised his real estates; because the remedies which they had against the heir of the debtor could not be enforced against his devisee. (*b*) However, the law in this respect is much altered by a modern act of parliament (*c*), which enacts, “that when any person, being at the time of his death a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts; and which, before the passing of this act, would have been assets for the payment of his debts due on any specialty in which the heirs were bound; the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they were before the passing of this act liable to, at the suit of creditors by specialty, in which the heirs were bound; provided always, that in the administration of assets by courts of equity, under and by virtue of this act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands.” To entitle joint creditors to proceed under this act of parliament against the real assets of a deceased

(*a*) Co. Litt. 209. (*a*)

(*b*) 2 Black. Com. 378.

(*c*) 47 Geo. 3. Sess. 2. c. 74. s. 1.

partner, it is necessary that the partnership or the trade should have continued until the time of his death; since, if, before that event, he ceases to be a trader, the provisions of the statute do not apply. (a) But if a person, labouring under a mortal disease, were to quit his trade, for the purpose of exonerating his estate, and letting it descend to his heir, it would be difficult to avoid the imputation of such fraud as would frustrate the design. (b) Where the heir at law is under age, it seems that a sale of the estate cannot be decreed during his minority, but must be postponed until he is of full age. (c)

Before concluding this treatise, we will advert to the cases in which courts of equity have assumed a jurisdiction to reform instruments, which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties. For example, relief has been granted upon a joint bond or security, as if it had been joint and several, against the representatives of the party first dying; the intention (as where credit had been previously given to the different persons who entered into the obligation) being gathered from the circumstances of the case, and it being considered that the bond was made joint, instead of joint and several, by mistake. It is true Lord *Eldon* has expressed some surprise at the introduction of such an equity, thinking that where parties have entered into a joint, instead of a joint and several contract, a court of equity ought to leave it to its fate as a joint contract; but so far from intimating a doubt of the existence of the doctrine, his lordship has expressly admitted it and acted upon it. (d) A court of equity, proceeding upon the intention, would, indeed, by decree in the lifetime of the deceased have rectified the security, so as to have made it conformable to the intention of the parties; it therefore places the creditor in no better situation than he would have been in if he had sued in the lifetime of the debtor, by holding, after the death of the latter, that the security shall be regarded according to the form in which, it must be presumed, it was originally intended to be framed. (e) In fact, a

(a) *Keene v. Riley*, 3 Meriv. 346. See also *Carter v. Dean*, 1 Swanst. 64.

(b) *Hitchon v. Bennett*, 4 Madd. 183.

(c) *Lechmere v. Brasier*, 2 Jac. & Walk. 290. See *Pott v. Gallini*, 1 Sim. & Stu. 209.

(d) *Ex parte Kendall*, 17 Ves. 519. *Gray v. Chiswell*, 9 Ves. 125. See also *Ball v. Storie*, 1 Sim. & Stu. 210. *Ex parte Halket*, 19 Ves. 474.

(e) *Gray v. Chiswell*, *supra*. *Underhill v. Horwood*, 10 Ves. 227.



court of equity ascribes to the securities no other effect than it was the purpose of the parties themselves to have given to them. Thus, where one of two persons to whom a joint loan was made, by mistake filled up the bond given to secure it as a joint, instead of a joint and several bond, Lord *Hardwicke*, on the ground of the mistake, relieved the obligee by effectuating his claim against the assets of a deceased obligor. (a) So, where a partnership firm, indebted on simple contract, intended that a bond should be given for the debt by which each should be separately bound; and, in pursuance of such intention, a bond was, through mistake and ignorance of the parties, filled up as a joint bond, and was executed only by the senior partner in the name of the partnership firm, but with the privity of the other partners who were present at the execution; the creditor was held entitled, as against simple contract creditors, to come in as a specialty creditor upon the estate of any of the partners. (b) And in all cases in which a security is, by mistake, executed as a joint instead of a separate security, or as a separate instead of a joint security, it does not affect the equitable right of the creditor to consider his debt separate or joint, according to the real intention of the parties. (c) Relief of this nature has also frequently been granted against the estate of a deceased partner, where a joint security only has been given for a partnership debt contracted in the way of trade, the legal remedy upon which, by the death of one, survived against the other alone, the ground of the equity being, that *quá* partners they were each of them liable for the whole debt; and therefore, as a several antecedent liability existed, independently of the instrument by which the debt was secured, the right of the creditor to enforce it severally ought not to be impaired by the circumstance of a joint security only having been taken. This species of relief was first administered in an early case (d); in which one partner had given a joint promissory note for money borrowed by him on the joint account, and the other partner dying, the holder of the note brought a bill to have satisfaction out of the estate of the deceased, and it was decreed to be proper in equity to follow his estate for satisfaction, because the note

(a) *Simpson v. Vaughan*, 2 Atk. 31. See also *Primrose v. Bromley*, 1 Atk. 90.

(b) *Burn v. Burn*, 3 Ves. 573.

(c) *Thomas v. Fraser*, ib. 399. *In re Bate*, ib. 400. n. *In re Freeman*, ib.

(d) *Lane v. Williams*, 2 Vern. 277, 292.

was given for a partnership debt. And in a case before Lord *Hardwicke*, in which similar relief was prayed, though he doubted a little at first, whether it sufficiently appeared that the security was intended to be separate as well as joint, yet when it was ascertained that the money had been borrowed in the course of a partnership dealing, he thought the equity was perfectly clear. (a) So, in *Jacomb v. Harwood* (b), it is evident Sir *John Strange* was of opinion, that the estates both of the deceased and the surviving partners were liable to the payment of a joint note, though it was not necessary to resort to that equity in the particular case, inasmuch as the surviving partner, as the executor of the deceased partner, had executed a mortgage to secure the debt, which it was held to be within his competency to do. (c) The same principle had been before acted upon by Lord Chancellor *Parker*, in a case in which a creditor held the joint bond of two partners, and upon a dissolution of the partnership, it was agreed that all the joint bonds should be discharged by one of the partners, to whom afterwards an application for payment was made by the creditor, when it was stipulated between them that the interest upon the bond should be increased, and some of the increased interest was in consequence paid. The latter partner having subsequently become bankrupt, it was held, that the creditor had an equitable claim upon the assets of the other partner who had died, notwithstanding he had proved his debt, and received a dividend, under the commission against the bankrupt partner. (d) So, where a person kept a cash account with three merchants who were in partnership, and they becoming indebted to him, a joint bond, signed by one partner only in the name of the partnership, was delivered for the balance due, after which one partner withdrew from the partnership, and another died, of which events, and of the introduction of new partners in their places respectively, the obligee had express notice sent to him; but he nevertheless continued to correspond with the new firm, in respect of the cash balance in their hands; Sir *Thomas Plumer* declared that the bond, though in its form joint, must in equity be taken as the joint and several bond of all the partners, and, consequently, that the representa-

(a) *Bishop v. Church*, 2 Ves. sen. 100. 371. S. C. reported on a different point in 3 Atk. 691.

(b) 2 Ves. sen. 365.

(c) See *Vulliamy v. Noble*, 3 Meriv. 614.

(d) *Heath v. Perceval*, 1 P. Wms. 682. S. C. 1 Stra. 303.

tives of the deceased partner were liable to make good the money due on it. (a) But every joint covenant is not to be considered in equity as the several covenant of each of the covenantors; for where it is purely matter of arbitrary convention growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken, and it is not pretended that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort, the extent of the covenant can be measured only by the words in which it is conceived. Therefore, where the executor of a deceased partner, instead of winding up the partnership concern, and dividing what might remain after satisfying all claims upon it, made an arrangement with the surviving partners, by which he was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing all interest in the residue to the other partners, from whom he obtained a joint covenant of indemnity against any claims upon the firm; it was determined that as no equity existed which could have entitled him to demand from the other partners such an indemnity, there was not a ground on which any other than its legal operation and effect could be ascribed to the covenant. (b)

(a) *Orr v. Chase*, cited 1 Meriv. 559., and reported *ibid.* 729.

(b) *Samner v. Powell*, 2 Meriv. 30.





## APPENDIX.





## APPENDIX.

## No. I.

*DEED OF PARTNERSHIP between Three Persons as Auctioneers and Surveyors, of whom Two had previously been engaged in the same Business, and the Third had acted as Clerk to one of them, with ordinary Clauses.*

**T**HIS Indenture, made, &c. between A of, &c. of the first part; B of, &c. of the second part; and C of, &c., now clerk and assistant to the said A, of the third part: whereas, each of them the said A and B has, for several years last past, and up to the day of the date of these presents, carried on, for his own benefit and on his separate account, the business of surveyor, auctioneer, estate agent, and appraiser, and it has been agreed, that the business so carried on by them respectively as aforesaid shall, from the day of the date hereof, be carried on by the said A, B, and C in copartnership, for the period upon the terms, and under and subject to the agreements, provisions, and stipulations hereinafter contained: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the mutual trust and confidence which the said A, B, and C have and repose in each other, each and every of them the said A, B, and C doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the other and others of them, and his and their respective executors and administrators, in manner following, (that is to say):—

Agreement  
to become  
copartners.

Mutual co-  
venants

1. That they, the said A, B, and C, shall and will become copartners in the business of surveyors, auctioneers, estate agents and appraisers from the day of the date hereof; and shall and will remain and be copartners in the said business for the term of fourteen years, to be computed from the day of the date hereof, but subject to the provisos for determining the said copartnership hereinafter contained, (that is to say)—Provided always, that if the said A and B, or the said C, shall be desirous of determining the said copartnership as far as regards the said C, and of such their or his desire, shall give one calendar month's notice in writing, under their or his respective hands or hand to the other or others of them, or leave such notice at the place where the said business shall, for the time being, be carried on; then and in such case, from and after the expiration of the said one calendar month's notice, the copartnership hereby intended to be esta-

To become  
partners.

Power to A  
and B, or to  
C, to determine  
the partnership  
as regards C  
by a month's  
notice.

Mode of dissolving the partnership *in toto*.

blished shall, in regard to the said C, absolutely cease and determine: Provided further, that if either of them the said A and B shall be desirous of determining the said copartnership *in toto*, and of such his desire shall give to the other of them three calendar months' notice in writing, or leave such notice at the place aforesaid, then and in such case, and immediately after the expiration of such three calendar months' notice, it shall be referred to G of &c., H of &c., and K of &c., or such one or more of them as shall be then living and willing to act in the matter as referee or referees, to determine whether the said copartnership should or should not be dissolved, and upon what terms and conditions; and for that purpose all necessary account-books, papers, and documents shall be produced and submitted to them: and in case the said G, H, and K, or such one or more of them as shall undertake to act as referee or referees, shall by any writing under their or his hands or hand to be delivered to each of them, the said A, B, and C personally, or to be left at the place aforesaid, determine, award, and direct, that the said copartnership shall be dissolved, and by the same writing shall specify the terms and conditions on and subject to which the same shall be dissolved, then and in such case, from the day on which such writing under the hands or hand of the said referees or referee shall be so delivered or left as aforesaid, the copartnership hereby intended to be established shall, in regard to all the said partners, absolutely cease and determine.

C's death not to operate a dissolution between A and B.

2. That in case the said C shall depart this life before the expiration of the said term of fourteen years; or in case the said copartnership shall, under or by virtue of the power hereinbefore contained, be determined so far as regards the said C only, then the said copartnership shall be continued by the said A and B, to the end of the said term of fourteen years, upon such and the same terms, and under and subject to such and the same agreements, provisions, and stipulations (including the power of determining the said copartnership by the said A and B), as are contained in these presents to all intents and purposes whatsoever, as if the copartnership had been originally formed between the said A and B, and these presents had been made and entered into between and by them alone.

Style of partnership.

3. That the firm and style of the said copartnership shall be A, B, and C.

Place of business.

4. That the business of the said copartnership shall be carried on at the house and premises of the said A in ——— aforesaid, in the rooms now appropriated by him to his said business, or at such other place or places as the said partners shall hereafter agree upon.

A to allow business to be carried on in his house.

5. That from the day of the date of these presents, and from time to time, and at all times during the said copartnership, the said A shall permit and suffer the rooms in his said house now appropriated to his said business, and also such other part or parts of his said house and premises as shall or may be necessary for carrying on the copartnership business, to be used, occupied, and enjoyed for that purpose: but such house and premises shall not to any further extent be considered as partnership property.

6. That such parts of the said house and premises as are not used for the purposes of the copartnership business, shall be exclusively held, used, occupied, and enjoyed by the said A, without any molestation or interruption by the said B and C, or either of them.

The parts of the house not required for business to be enjoyed exclusively by A.

7. That on the determination of the said copartnership, either by effluxion of time, or otherwise, the said A shall and may retain the said house and premises, and continue to carry on therein his said business in the manner in which he now carries on the same, and as if the said copartnership had never existed.

On the determination of the partnership, the house to be retained by A.

8. That all the debts which on the day of the date hereof are due and owing to the said A in respect of his said business, and all the gains and profits which shall arise from the sale of the — estate, situate in the county of —, and from any business connected with and necessary for completing such sale, shall be received and retained by, and be the exclusive property of, the said A.

All debts now due to A, and also the profits from a particular sale to belong to A.

9. That the rent, and all taxes, assessments, and outgoings whatsoever, including repairs, which during such time as the business of the said copartnership shall be carried on in the said house and premises in — aforesaid, or which shall be due and payable in respect of the same or any other premises taken for the purpose of the said copartnership business, and the salaries, maintenance and wages of all clerks, servants, and workmen to be employed in the said business; and all expenses, losses, and damages which shall be paid, sustained, or incurred in carrying on the same, or in any wise relating thereto, shall be paid and borne with and out of the monies and effects of the said copartnership, and the gains and profits arising from the same.

Rent, &c. and expenses of the partnership to be defrayed out of the profits.

10. That the said A and B shall be entitled to the net gains and profits arising from the business of the said copartnership, after deducting the salary or allowance made to the said C as herein-after mentioned, in the shares and proportions following: (that is to say,) the said A shall be entitled to two equal third parts or shares thereof, and the said B shall be entitled to the remaining equal third part or share thereof.

Shares of A and B in profits.

11. That if either of the said partners, with the assent of the others of them, shall lend, advance, or bring into the said partnership concern any sum of money, he shall be entitled to debit the said copartnership with interest for the same, after the rate of five pounds per cent. per annum, for such period as the same shall remain, with such consent as aforesaid, to the credit of the said copartnership, the same to be payable half-yearly; and such partner is also to be at liberty to withdraw the principal money so lent or advanced or brought in, at his free will and pleasure.

Partner lending money to the partnership entitled to interest.

12. That in each year of the said copartnership, it shall be lawful for the said A to take out of the monies and effects of the said copartnership any sum or sums of money not exceeding the sum of — pounds quarterly during the said copartnership; and for the said B in like manner to take out any sum or sums of money not exceeding the sum of — pounds quarterly, which sums shall be in part satisfaction of their respective shares in the residue of the said net gains and profits.

Quarterly allowance to A and B.



C entitled to a salary to be paid quarterly.

13. That the said C shall, during the first three years of the said copartnership, receive out of the gains and profits of the said business a salary or allowance of — pounds a year; and during the fourth year of the said copartnership a salary or allowance of — pounds a year; and in the fifth and every subsequent year of the said copartnership in which the net and clear gains and profits of the said business shall amount to — pounds a year or upwards, a salary or allowance of — pounds a year: but in the fifth or any subsequent year of the said copartnership, in which the said net gains and profits shall not amount to — pounds a year, then a salary or allowance of — pounds a year; every such salary or allowance to be paid to the said C in equal quarterly portions.

Annual account to be taken.

14. That on the thirty-first day of *December* now next ensuing, and on every succeeding thirty-first day of *December* during the continuance of the said copartnership, a full and general account and rest shall be made and taken by the said partners of the monies, debts, and effects belonging and due, or owing to the said copartnership, and of all such debts as shall be due and owing from or by the said copartnership in respect of the business thereof, which from time to time shall be written either into the ledger belonging to the said copartnership, or into two separate books, and shall be signed and subscribed by each and every of the said partners within one calendar month after the time appointed for the taking thereof respectively. And that after such subscription, each and every of the said partners shall be bound and concluded by every such account respectively, unless some manifest error shall be afterwards found therein, and be signified by writing by one of the said partners to the other or others of them, and in which case such error only shall be rectified.

Profits, how to be divided.

15. That with all convenient speed, after the settlement of such yearly account, what shall appear the net gains and profits arising from the business of the said copartnership during the year, ending on the days hereinbefore appointed for the taking of such account (after deducting such salary or allowance to the said C as aforesaid), shall, after deducting the sums to be taken out by the said A and B, in part satisfaction of their respective shares thereof as aforesaid, be taken out and divided between the said A and B, in the proportions in which they shall respectively be entitled thereto as hereinbefore is mentioned.

Books of account to be kept.

16. That proper books of account shall be kept by the said partners, and that entries shall be made therein of all such matters, transactions, and things, as are usually written and entered into books of account, kept by persons engaged in concerns of a similar nature.

Books of account and securities to remain at the office of business.

17. That the said books of account, and all securities, letters, papers, and writings, which shall from time to time relate to or concern the said copartnership or the business thereof, shall remain and be kept at the office where the said business shall be for the time being carried on; and that the said A and B shall, at all times, have free access to inspect, examine, cast up, and copy out the same, without any hinderance or denial of or by the other of them.

18. That the cash of the said copartnership shall be kept at the banking-house of ———, (or at such other banking-house as the said A and B may agree upon,) in the joint names or account of all the said partners; but no draft or checks for any copartnership money shall be drawn except by the said A and B.

Bankers of the partnership.

19. That each and every of the said partners shall be just and faithful to the other of them in all receipts, payments, accounts, dealings, and transactions, on account of, or relating to, the said copartnership; and shall and will give and render to the other or others of them a just and faithful account of the same, when and so often as the same shall be reasonably required.

Each partner to be faithful to the other.

20. That neither the said B, nor the said C, during the continuance of the said copartnership, either by himself or themselves, or with any other person or persons whomsoever, directly or indirectly shall engage in any other business whatsoever, without the consent, in writing, of the said A.

B and C not to engage in any other business.

21. That in all cases where there shall be occasion to give any bond, note, or other security, for the payment of any sum or sums of money on account of the said copartnership, such bond note, or other security, shall be respectively executed and signed by the said A and B, or by one of them, with the previous consent, in writing, of the other of them.

Bond, &c. on account of partnership to be signed by A or B with the consent of the other.

22. That if any of the said partners shall give any such bond note, or other security, which shall not be signed and executed as last aforesaid, the same shall be deemed a dissolution of the said partnership so far as regards the party so giving such bond, note, or other security.

Bond, &c. otherwise given to be deemed a dissolution of the partnership.

23. That neither of the said partners shall purchase or contract for any goods, wares, merchandise, article or thing whatsoever, for or on account of the said copartnership, without the consent, in writing, of the said A and B.

No purchase to be made without consent.

24. That within two calendar months after the expiration of the said term of fourteen years, or after the dissolution of the said copartnership in pursuance of either of the provisos for that purpose hereinbefore contained, an account, in writing, shall be stated and settled between the said partners of all the monies, debts, and effects of or belonging to, and all the debts or sums of money due and owing from or by the said copartnership; and upon the finishing of such account the partners shall forthwith make due provision for the payment and satisfaction of such debts and engagements as shall then appear to be due from the said copartnership; and the balance of the said copartnership monies, debts, and effects, and the profits thereof, and other the matters to be included in such general account, shall after making such provision as aforesaid, and paying to the said C the arrears (if any) of his said salary or allowance, be divided between the said A and B, or their respective executors or administrators, in the shares and proportions in which they shall be respectively entitled thereto; and after making such division, such instrument, in writing, shall be executed by all the said partners respectively, for facilitating the getting in of outstanding debts and effects, and for indemnifying each other touching the premises, and for vesting the sole right and property in the said respective shares

Final account and division to be made at the dissolution.

of and in the said monies, debts, and effects, in the partners to whom the same respectively shall upon such division belong, and for releasing to each other all claims on account of the said copartnership as are usual in cases of the like nature, or as shall be necessary for carrying into effect any order or direction to be made by such referees or referee as aforesaid, in case the said copartnership shall be dissolved by their or his direction.

Final account  
and division in  
the case of a  
dissolution by  
the death of A  
or B.

25. That within two calendar months after the determination of the said copartnership, by the death of either of them the said A and B (in case the said copartnership shall be so determined), an account in writing shall be stated and settled of all debts or sums of money due and owing to, and of all debts or sums of money due and owing from, or by the said copartnership; and within one calendar month after such last-mentioned account shall be so stated and settled, the survivor of them, the said A and B, shall execute and give to the executors or administrators of him so dying sufficient security for the due payment of such a sum as on the preceding annual account shall appear to be the amount of the share of the partner so dying of and in the clear gains and profits of the business of the said copartnership for such preceding year, and shall render and pay to the executors or administrators of such deceased partner what, if any thing, shall be otherwise due to him from the said partnership concern up to the preceding annual settlement, and enter into a bond to collect and get in such of the outstanding debts and effects of the said copartnership, to a proportion whereof such deceased partner would be entitled as aforesaid; and from time to time, as and when the receipts in respect thereof shall amount to 100%, pay the proportion of such deceased partner to his executors or administrators; and in case such outstanding debts and effects shall not be collected within twelve calendar months then next following, the same shall be divided in such and the same manner as herein provided for on the determination of the said copartnership by effluxion of time.

Clause for  
referring dis-  
putes to  
arbitration.

26. That if at any time during the said copartnership, or after the determination thereof, any dispute or controversy shall arise between the said parties, or between any of them and the executors or administrators of the other or others of them, or between their respective executors or administrators concerning any of the clauses, covenants, and agreements herein contained, or any other matter or thing whatsoever in any wise relating to the said copartnership, the same shall be referred to the award or arbitration of such persons as shall be nominated or appointed for that purpose by the parties in difference within thirty days next after any such dispute or controversy shall happen; and in case such arbitrators shall not agree in the premises within the space of thirty days next after any such dispute or controversy shall be referred to them, the same shall be referred to the determination of such indifferent person as the said arbitrators by any writing, under their hands shall nominate and appoint as umpire in the premises; and that the award of such arbitrators is made in writing under their hands and seals, to be delivered to the parties in difference within the time before limited, or in default thereof the award of such umpire, under his hand and seal, to be delivered to the parties in



difference within thirty days after he shall be so appointed, shall be binding and conclusive on all the said parties; and that in case any or either of the parties in difference shall neglect or refuse, by the space of one calendar month after notice in writing given by the other or others of them for that purpose, to join in the appointment of such arbitrators as aforesaid, it shall be lawful for the arbitrator or arbitrators to be chosen by the party or parties giving such notice, to make an award which shall be binding in like manner as if the party or parties so neglecting or refusing had chosen an arbitrator who had actually joined therein.

And lastly, that for the further and better enforcing the performance and observance of every such award so to be made as aforesaid, the reference or submission for or in respect of the same shall from time to time be made a rule of the Court of King's Bench, according to the direction of the statute in that case made and provided. In witness, &c.

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No. II.

*DEED OF COPARTNERSHIP between Six Persons as Merchants, with some Special Clauses.*

THIS Indenture, made, &c. between A of, &c. of the first part; B of, &c. of the second part; C of, &c. of the third part; D of, &c. of the fourth part; E of, &c. of the fifth part; and F. of, &c. of the sixth part. Whereas the said A, B, C, D, E, and F, have agreed to become copartners in the business of general merchants for the term, and under, and subject to the provisions, conditions, covenants, and agreements hereinafter mentioned and contained: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the mutual confidence which the said parties respectively repose in each other, each and every of them the said A, B, C, D, E, and F, so far as relates to the observance and performance by him, his executors and administrators, of the covenants and agreements hereinafter contained on his and their parts to be observed and performed, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the others, and each and every of the others of them, their, and his executors and administrators, in manner following (that is to say):

Agreement  
to form the  
partnership.

Mutual co-  
venants.

That they, the said parties respectively, will become and continue copartners in the business of general merchants, from the day of the dates of these presents, for the term of ten years thence next ensuing.

To become  
partners.

That the firm or style of the said copartnership, shall be "A, Band Co.," or such other firm or style as the said partners, or the major part of them, shall hereafter agree upon.

Style of the  
firm.

That the business of the said copartnership shall be carried on, at or in the house or warehouse in ———, or at or in such other

Business, where  
to be carried on.

Capital to be advanced by the partners.

place or places as the said partners, or the major part of them, shall hereafter agree upon.

That the capital or joint stock of the said copartnership, shall consist of the sum of ———, or such other sums of money as the said partners, or the major part of them, shall hereafter agree upon, and shall be brought in by the said partners in the proportions following: (that is to say,) three-fourteenth parts or shares thereof by each of them the said A and B; and two-fourteenth parts or shares thereof by each of them the said C, D, E, and F.

Partner not bringing in his share, amount to be carried to his debit and carry interest.

That if any one or more of the partners shall at any time neglect or refuse to bring in his or their share or shares of the said capital of the said copartnership at the time he or they ought to bring in the same, the amount of such share or shares, or such part thereof as shall not be brought in, shall be placed to the debit of the account of such partner or partners with the said copartnership, and shall carry interest at the rate of 5% for 100% by the year.

Partner not bringing in his share within three months after notice, may be expelled.

That if any one or more of the said partners shall at any time neglect or refuse, for the space of three calendar months, after being thereunto requested in writing by the others of the partners for the time being, or the major part of them, to bring in his or their share or shares of the said capital of the said copartnership, it shall be lawful for the others of the said partners, or the major part of them, to expel the partner or partners, so for the time being offending in the premises from the said copartnership, in like manner and upon the like terms as hereinafter is mentioned, with respect to the expulsion of a partner in any of the events hereinafter in that behalf mentioned.

Capital to be employed in the business.

That the said capital or joint stock, and the increase thereof, and the gains and profits arising from the same respectively, shall (subject as hereinafter is mentioned) be used and employed in the business of the said copartnership.

Expenses and losses to be borne out of capital, or profits, and in the event of their deficiency, out of the separate estates of the partners.

That the rent and taxes of the house and warehouse in ———, and of any other house and warehouse, in which the business of the said copartnership shall, for the time being be carried on, and all repairs, additions and alterations which shall be made in or to the same, and the wages or maintenance of the clerks, apprentices, and servants who shall be employed in the business of the said copartnership, and all other necessary expenses whatsoever which shall be incurred in or about the said business or relating thereto, and all debts and duties which shall be owing by reason or on account of the said joint trade, and any loss or damage which shall happen thereto by bad debts, decay of goods, suits at law or in equity, or otherwise, shall be paid or borne by and out of the joint stock of the said copartnership, and the gains and profits arising from the business thereof, if the same shall be sufficient for that purpose; and if not, then as to the deficiency by the said parties out of their respective separate estates, in the like shares and proportions in which they are hereinbefore required to bring in the capital of the said copartnership.

Division of profits.

That the said partners shall be entitled to the net gains and profits of the business of the said copartnership (after making such deductions as hereinbefore mentioned), in the like shares and proportions in which they are hereinbefore required to bring in the capital of the said copartnership.

That it shall be lawful for each and every of the said partners to draw out of the said copartnership business by four equal quarterly portions, on the ——— day of ———, the ——— day of ———, the ——— day of ———, and the ——— day of ———, in every year during the said copartnership, for his own separate use a sum of money equal in amount to ——— pounds for every one hundred pounds of his share in the capital of the said copartnership, to be accounted for on the next division of the profits.

Sums to be drawn out quarterly.

That each of them the said A and B, shall receive out of the monies and effects of the said copartnership, as a recompense or remuneration for his care and trouble in managing and carrying on the business thereof, the yearly sum of ——— pounds, and so in proportion for any less time than a year; and that the said F shall receive out of the same monies and effects, as a recompense or remuneration for his care and trouble in attending to the affairs and business of the said copartnership, the yearly sum of ——— pounds, and so in proportion for any less time than a year.

Acting partners to receive a given yearly sum for their trouble.

That in case any of the said partners shall, for the convenience of the business of the said copartnership, and with the consent of the others of the partners, or the major part of them, bring into the said copartnership business any sum or sums of money by way of loan, the same shall be immediately entered in the cash book of the said copartnership, as a debt due from the concern to the partner lending the same, and shall thenceforth become a charge upon the partnership estate, and shall bear or carry interest after the rate of 5*l.* for 100*l.* by the year; and the partner lending such sum or sums of money shall be at liberty to take such interest out of the cash of the said copartnership, by half-yearly payments, from the time or respective times of lending the same; and that the party lending shall not require the principal to be repaid, and the partners not lending, or the major part of them, shall not require the partner so lending to take back the principal without six months' previous notice in writing for that purpose being given by the party or parties requiring the same to be repaid or accepted (as the case may be); and if the party lending such sum or sums of money shall neglect or refuse to take back the same, upon such notice as aforesaid, interest thereon shall cease from the time of the expiration of such notice.

Money brought in as a loan to carry interest, and not to be withdrawn or repaid without six months' notice.

That the said partners respectively shall from time to time, during the continuance of the said partnership, write or cause to be written, in proper books of account to be kept for that purpose, true, plain, and perfect entries of all monies, goods, wares, merchandise, effects, and things belonging or relating to the business of the copartnership, which shall be received, paid, sold, delivered or contracted for, in the course of such trade or business, and of all such other matters and transactions as shall be or ought to be entered in the said books in the usual and regular course of the said business; together with all such circumstances of names, times and places, as may be necessary or useful for the better manifestation of the state and proceedings of the business of the said copartnership.

Proper accounts to be kept.

That the said books of account, together with all bonds, bills,

Books of account, &c.



to be kept at the counting-house.

A, B, and F, to devote the whole of their time to the business.

C, D, and E, need not act therein further than they think fit.

Partners to render faithful accounts.

Partners not to employ the monies, or engage the credit of the partnership, except in the ordinary course of business ; nor engage in any other business.

No partner, without the other's consent, to take apprentices ; or hire or dismiss clerks or servants.

Or trust persons whom the others shall have forbidden to be trusted ; or release or compound debts, or sign bankrupts' certificates.

notes, drafts, securities, letters, and other papers and writings relating to the said business, shall be kept at the counting-house, or other place where the copartnership business shall for the time being be carried on, and not elsewhere ; and that each and every of the said partners shall and may, from time to time, and at all times, have free access to inspect and examine, cast up, and copy out the same, at his own free will and pleasure, without any hindrance or denial of or by the others or any of the others of them.

That the said A, B, and F, shall devote the whole of their time to the business of the said copartnership, and superintend the management thereof, and shall faithfully and diligently employ themselves in and about the affairs and concerns thereof, and carry on and conduct the same according to the best of their skill and ability.

That the said C, D, and E, shall not be obliged to attend to the business of the said copartnership any further than they shall respectively think fit ; but that so far as they shall attend thereto, they shall carry on and conduct the same for the greatest benefit and advantage of the copartnership.

That each and every of the said partners shall be just and faithful to the others, and each of the others of them, in all buyings, sellings, accounts, reckonings, receipts, payments, dealings and transactions, in or about the said business of the said copartnership ; and shall give and render unto the others, and each of the others of them, a true and faithful account of the same, when and so often as the same shall be reasonably required.

That none of the said partners shall, without the consent in writing of the others, or other of them, use or employ any of the monies, goods, or effects, belonging to the said copartnership, or engage the credit thereof in any matter or thing whatsoever, except upon the account, and for the use and benefit of the said copartnership, and except in the regular and ordinary course of business.

That none of the said partners shall or will, during the continuance of the said copartnership be concerned, or in any manner engaged, in any other trade, manufacture, or business whatsoever.

That none of the said partners shall, without the consent of the others of them, or the major part of them, take any apprentice, or article clerk, to be employed in the business of the said copartnership, or hire or dismiss any other clerk or servant employed, or to be employed in the said business, against the consent of the others of the said partners, or the major part of them.

That none of the said partners shall, at any time during the continuance of the said copartnership, without the consent in writing of the others of them, or the major part of them, lend any of the monies, or deliver upon credit any of the goods belonging to the said copartnership, to any person or persons whom the others of the said partners, or the major part of them, shall, before the lending or delivering of such monies or goods, have forbidden to be trusted ; or without the like consent, release or compound any debt or debts due and owing to the said copartnership, except for the full amount thereof first paid ; or, without the like consent, sign the certificate of any bankrupt indebted to the copartnership,

except in cases where the amount of the debt shall be under £.; and that each of the said partners shall be accountable for, and shall make good unto this partnership, the whole of such debts and monies as he, or any other person by his order or authority, shall receive or give any receipt for.

That none of the said partners shall buy, order, or engage in any contract for any goods or merchandise whatsoever, on account of the copartnership, exceeding the value of £., without the consent in writing of the others of them, or the major part of them, for that purpose first had and obtained; and that if any of them shall buy, order, or engage in any contract for any goods or merchandise exceeding the value of £., without such consent as aforesaid, then and in such case the others or other of them, shall or may elect either to take such goods or merchandise on account of the said copartnership, or to allow the same to remain for the separate use of the party or parties who shall so buy, order, or contract for the same.

Partners may take or reject goods beyond the value of £., bought by any partner without the consent of the others.

That none of the said partners shall, without the consent in writing of the others or other of them first obtained, enter into any bond, or become bound as bail, surety or security, with or for any person or persons whomsoever, or subscribe any policy of insurance; or do, or knowingly suffer to be done, any act, matter, or thing whatsoever, by means whereof the stock and effects, belonging or to belong to the said copartnership, shall or may be seized, attached, extended, or taken in execution.

None of the partners, without consent, to give bond or become bail for any person, or do any act whereby partnership may be prejudiced.

That each of the said partners shall, from time to time, and at all times hereafter, save, defend, keep harmless, and indemnified, the others of the said partners, and their respective executors and administrators, and the capital or joint stock of the said copartnership, from and against his own separate debts and engagements, and all costs, charges, damages, and expenses on account thereof.

Each partner to indemnify the others from his private debts.

That Messrs. M. and Company, or such other bankers as the said parties shall mutually agree on, shall be the bankers of the said copartnership; and all monies which shall be received by any of the said partners in respect of the said copartnership business, shall, with all convenient speed, after the same shall be received, be paid into the banking-house for the time being agreed upon by the said parties.

Appointment of bankers.

That no bill, promissory note, or other security, (except drafts or cheques upon the bankers of the said copartnership,) shall be drawn, accepted, or indorsed, in the name, or with the firm of the copartnership, by any of the said partners, without the consent of the others of the said partners, or the major part of them, for that purpose first had and obtained.

No bill, &c. (except drafts) to be given in the joint name by one partner without the consent of the others.

That if any of the said partners shall draw, accept, or indorse any bill, note, or other security, in the name, or with the firm of the said copartnership, without the consent of the others of the said partners, or the major part of them, for that purpose first had and obtained, every such bill, note, or other security, shall be deemed to be given on the separate account of the partner or partners drawing, accepting, or indorsing the same; and he or they shall accordingly pay, satisfy, and discharge the same out of his or their separate estate or estates; and shall indemnify and save

Bills, &c. without such consent to be considered as given on separate account.

harmless the others and each of the others of them, their, and his heirs, executors, and administrators, and their and his estate and effects respectively, from and against the payment thereof, and all actions, suits, costs, damages, and expenses, on account thereof.

Yearly accounts  
to be taken.

That on the first day of now next ensuing, and on every succeeding first day of during the continuance of the said copartnership, a general account or rest, in writing, shall be made and taken by the said partners, or some or one of them, either alone or with the concurrence of the others or other of them, of all monies, debts, and effects, belonging, or due, or owing to the said copartnership, and of all such debts as shall be then owing by the said partners, for or on account of the said copartnership, to any person or persons whomsoever; and also of all such matters and things as are usually included in accounts of the same nature; and that when, and so soon as the said yearly account, for the time being, shall be adjusted and settled, the same shall be signed by all the said partners; and the said partners shall afterwards be bound and concluded by each such yearly account, unless some error to the amount of twenty pounds or upwards shall appear therein, within three calendar months from the settlement thereof respectively; and, in that case, the account or accounts shall be opened and unravelled so far only as relates to the error or errors which shall have appeared therein as aforesaid.

Division of  
profits after the  
settlement of  
such yearly  
account.

That after the settlement of every such yearly account, as aforesaid, such part of the clear gains and profits of the preceding year as the said partners, or the major part of them, shall mutually agree upon, after payment or allowance of the yearly sums so agreed to be taken out by them for their separate use as aforesaid, shall be taken out and divided between the said partners, in the proportions in which they are entitled to the same as aforesaid; and the surplus or residue thereof shall, from time to time, be added to, and go in augmentation of the capital of the said copartnership.

Power to A  
and B to retire  
after the first  
seven years, on  
giving six  
months' notice.

That it shall be lawful for each of them the said A and B, at any time after the expiration of the first three years of the said copartnership term of ten years, to retire from and relinquish the business of the said copartnership, on giving six calendar months' previous notice in writing of his intention so to do to the others of the said partners for the time being, or leaving such notice at their usual or last known places of abode.

At the ex-  
piration of  
such notice as  
regards A or  
B partnership  
to cease.

That if the said A or B, or both of them, shall, in pursuance of the provision hereinbefore for that purpose contained, give or leave notice in writing of his or their intention to retire from and relinquish the said business, the said A or B, or both of them, (as the case may be,) shall, at the expiration of six calendar months from the time when such notice shall have been so given or left as aforesaid, be considered to have retired from the said copartnership; and the said copartnership shall, from that time, as to the said A or B or both of them, cease and determine.

On the re-  
tirement of A  
or B, or the  
death of any  
of the partners,  
a value forth-

That if the said A or B, or both of them, shall retire from the said copartnership, in pursuance of the provision hereinbefore for that purpose contained; or if any one or more of the said partners shall die while engaged in the said copartnership, then and in any of the said cases, and when and so often as the same shall happen,



the retiring partner, his executors and administrators, or the executors or administrators of the deceased partner, (as the case may be,) and the continuing or surviving partners or partner, their or his executors or administrators, shall, within two calendar months next after such retirement or death, fix a value on the part or share of the retiring or deceased partner, of and in the stock, capital, and effects of the said copartnership, and within twenty days after the value of such part or share shall be so fixed as aforesaid, the continuing or surviving partners or partner, their or his executors or administrators, shall execute and give to the retiring partner, his executors or administrators, or to the executors or administrators of the deceased partner, (as the case may be,) a bond in a penalty double the principal, conditioned for the payment of such value, with interest for the same, after the rate of four pounds for one hundred pounds by the year, to be computed from the retirement of the retiring partner, or the decease of the deceased partner, (as the case may be,) in manner following (that is to say):— One moiety or half part of such value at the expiration of twelve calendar months after such retirement or death, and the remaining moiety or half part of such value, at the expiration of eighteen calendar months after such retirement or death; and the interest of the said value, or of so much thereof as shall, for the time being, remain due at the expiration of every six calendar months after such retirement or death; and the continuing or surviving partners or partner, their or his executors or administrators, shall also, within twenty days after the value of the share of any retiring or deceased partner shall be so fixed as aforesaid, execute and give to the retiring partner, his executors or administrators, or to the executors or administrators of the deceased partner, (as the case may be,) another bond in a sufficient or reasonable penalty, for indemnifying him or them, and the estate and effects of the retiring or deceased partner, (as the case may be,) from and against the debts and engagements due and owing from the said copartnership at the time of such retirement or death, and from and against all actions, suits, damages, and expenses whatsoever in respect thereof; and the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, (as the case may be), shall, within the said twenty days, release and assign to the continuing or surviving partners or partner, their or his executors or administrators, all his or their share, right, title, and interest, of in and to the stock, monies, debts, and effects, belonging, due, and owing to the said copartnership, and, so far as possible, empower and enable them and him to recover and receive the same.

That if any of the said partners shall, at any time during the continuance of this copartnership, be found lunatic, then, and in every such case, it shall be lawful for the others of the said partners, or the major part of them, at any time thereafter, by any writing under their hands, to be delivered to the committee of the estate of such lunatic partner, or left at his last or usual place of abode, to determine and dissolve the said copartnership as to such partner, and to take to and purchase his share in the copartnership capital and effects, on the footing of the last valuation or rest

with to be fixed on his share;

and the amount of such value to be secured by the bond of the continuing or surviving partners;

payable in moieties at twelve and eighteen months, with interest half yearly: and the continuing or surviving partner also to give to the retiring partner, or the executors of a deceased partner, a bond of indemnity against the joint debts;

and the retiring partner, or the executors of the deceased partner, thereupon to release and assign his or their share in the joint stock, to the continuing or surviving partner.

In case of the lunacy of any partner, the other partners may dissolve the partnership and purchase his share at a valuation:

such value to be secured in like manner as is provided with respect to the value of the share of a retiring or deceased partner.

Upon the entire or partial dissolution of the partnership, notice thereof shall be inserted in the London Gazette, &c. ; and if any shall refuse or be unable to sign such notice, the others may sign it for him.

A and B may by deed or will admit their sons into the partnership, as acting partners, and assign or bequeath to them their shares in the capital.

Any son of A or B succeed-

which shall have been made thereof ; or if there shall have been no such valuation or rest made within twelve calendar months immediately preceding the determination or dissolution of the said copartnership as last aforesaid, then, on the footing of a valuation to be made by the continuing partners and the committee of the estate of the partner so for the time being found lunatic, or by arbitrators to be appointed by them respectively, in like manner as is hereinafter provided with respect to the settlement by arbitration of any difference or dispute which may arise under or by virtue of these presents ; and that the value of such share to be ascertained as aforesaid, together with interest thereon, after the rate of five pounds for one hundred pounds by the year, to be computed from the then last valuation or rest, or the determination or dissolution of the said copartnership as last aforesaid, (as the case may be,) shall be secured to the committee of the estate of the partner so for the time being found lunatic, by the joint and several bond or obligation in writing of the continuing partners, at such times and in such manner as hereinbefore is mentioned, with respect to the payment of the value of the share in the copartnership effects of any partner who shall retire from the said copartnership, or die during the continuance thereof.

That upon the entire or partial dissolution of the said copartnership, under any of the provisions hereinbefore contained, a notice of the determination of the said partnership shall be signed by all the partners, and inserted in the London Gazette, and sent to the customers of the said copartnership ; and that if any of the said partners shall neglect or refuse, for the space of three days after being thereunto requested by the others, or any of the others of them, to sign such notice, or shall by reason of lunacy, illness, absence from the kingdom, or otherwise, be unable to sign the same, then, and in every such case, it shall be lawful for the other partners to sign such notice, in or with the name, and as the attorneys, of the partner or partners who shall so neglect or refuse, or be incapable to sign the same as aforesaid.

That it shall be lawful for each of them the said A and B, at any time or times while engaged in the said copartnership, by deed or writing under his hand and seal, and at any time hereafter, while engaged in the said business, by his last will and testament in writing, or any codicil or codicils thereto in writing, to nominate and appoint one of his sons to succeed to his share in the said copartnership business, and the capital or joint stock and future gains and profits thereof ; and to assign, bequeath, or otherwise make over the same share to such son accordingly : provided always, that no son of the said A or of the said B shall succeed to his father's share in the said business, under this present provision, unless at the time of his nomination thereto he shall be of the age of twenty-one years, and shall, within one calendar month next after his nomination, signify his intention to succeed to such share, to the continuing or remaining partners, by some writing under his hand, to be given to them, or left for them at the counting-house where the copartnership business shall, for the time being, be carried on.

That in case any son of the said A or of the said B shall suc-

ceed to his father's share in the said copartnership business, under the provision lastly hereinbefore contained, he shall from that time be an acting partner in the said business in respect of such share, and shall be entitled to such share, upon the same terms and conditions, and with, under, and subject to the same benefits, advantages, powers, provisions, restrictions, duties, regulations, conditions, and agreements, and in every respect in the same manner, as his father would have been entitled to the same if he had lived and remained a partner in respect thereof, save and except the powers of nomination, or appointment and assignment, or bequest lastly hereinbefore contained.

ing to his father's share, shall hold it on the same terms.

That with all convenient speed after any person or persons shall be admitted a partner or partners in the said copartnership business, under the provision hereinbefore for that purpose contained, such deeds of covenant and other deeds, acts, matters, and things shall be prepared, made, done, and executed by and between the said parties, as counsel learned in the law shall reasonably advise or require, for placing the admitted partner or partners in the situation of the party in respect of whose share he or they shall be admitted, and for subjecting such partner or partners to the covenants and agreements herein contained, so far as the same relate to or concern the share in respect of which he or they shall be so admitted.

Upon the admission of a partner, such deeds of covenant, &c. shall be executed between the parties as counsel shall require.

That at the end or expiration or determination of this copartnership, a final settlement of accounts in writing shall be made by the partners for the time being, of all the stock in trade, debts, and effects, of or belonging and due and owing to the said copartnership, and also of the debts and engagements due and owing from, or to be performed by, the said copartnership; and upon the statement of such last-mentioned account, the said partners, or the major part of them, shall make such provision for the payment and satisfaction of the debts and engagements which shall then appear to be due from, or to be performed by, the said copartnership, as they shall think fit and proper; and subject thereto the said stock in trade, debts, and effects of or belonging and due and owing to the said copartnership, and so to be included in such last-mentioned account as aforesaid, shall be allotted, divided, and apportioned unto, between, and amongst the partners for the time being entitled thereto, in such lots, shares, manner, and form as the said partners, or the major part of them, shall, in their or his own discretion, think proper to order or direct: and after making such division, such instruments in writing shall be executed by the said partners, for facilitating the getting in of the debts and effects outstanding, and for indemnifying each other touching the premises, and for vesting the sole right and property in the said respective shares and allotments of the said stock, effects, and premises, in the parties to whom the same respectively shall, upon such division, belong, and for releasing to each other all claims and demands on account of the said copartnership, as are usual in cases of the like nature.

Final settlement of accounts at the dissolution.

That if any doubt, difference, or question shall at any time hereafter arise or happen between or amongst the said parties to these presents, or any of them, or between any of them and the

Arbitration clause.



executors or administrators of the other or others of them, or between their respective executors, administrators, or assigns, touching the construction of these presents, or any clause, matter, or thing herein contained, or any account, or rest, or valuation, or appraisement, to be made as hereinbefore is mentioned, or any other matter, cause, or thing whatsoever, in any wise relating to or concerning the said copartnership, or the business thereof, and such doubt, difference, or question shall not be settled and decided between or amongst themselves, within one calendar month next after the same shall have arisen; then, and in every or any such case, and when and so often as the same shall happen, such doubt, difference, or question shall, upon the request of any of the said said partners, or their or any of their executors or administrators, from time to time be reduced into writing, and be committed or referred to the arbitration of three indifferent and competent persons, one of them to be chosen by one of the parties in difference, and another of them by the other party in difference, and the third by the two persons who shall be so first chosen, so as that such three indifferent and competent persons be chosen within two calendar months next after such request; and the award, order, or determination of the said three persons so to be chosen as aforesaid, or any two of them, in the matter or matters referred to them, shall be binding and conclusive upon the said parties in difference, and their respective heirs, executors, administrators, and assigns, and shall be performed, observed, and kept by them accordingly, without any further suit or trouble whatsoever, so as such award, order, or determination be made and set down in writing, under the hands and seals of such three persons, or any two of them, within the space of twenty-one days next after all the said three persons shall have been so appointed as aforesaid.

That if any such doubt, difference, or question as aforesaid shall arise, and any of the said partners, or his or their executors, administrators, or assigns, shall, by any writing under his or their hand or hands, to be given to the other partner or partners, or their or his executors, administrators, or assigns, or left at his or their usual or last known place or places of abode, request such other partners or partner, or their or his executors, administrators, or assigns, to refer such doubt, difference, or question to arbitration, and to nominate some indifferent and competent person to be an arbitrator therein on his or their behalf, and the person or persons to or for whom such request shall be so given or left as last aforesaid shall, for the space of two calendar months next after such request, refuse or neglect so to do; then, and in such case, and so often as the same shall happen, it shall and may be lawful to and for the person or persons giving or leaving such request, by writing under his or their hand or hands, to choose and appoint some indifferent and competent person to act as an arbitrator on the part of the party or parties so refusing or neglecting as aforesaid; and the two persons who shall be so chosen arbitrators, as last hereinbefore is mentioned, shall thereupon, or in a reasonable time thereafter, choose an umpire between them; and the award or determination of such arbitrators or umpire, as last hereinbefore

is mentioned, in the matters which shall be so referred to them as aforesaid, shall, to all intents, effects, constructions, and purposes, be as valid, effectual, binding, and conclusive, as if the person chosen as arbitrator by the person or persons so giving or leaving such request as aforesaid had been chosen by the person or persons to or for whom such request shall have been given or left.

And that for the further and better enforcing the observance and performance of every or any award, order, or determination, to be made as aforesaid, the reference or submission for or in respect of the same shall from time to time be made a rule of one of His Majesty's Courts of King's Bench or Common Pleas, at Westminster, according to the direction of the statute in that case made and provided. In witness, &c.

### No. III.

#### *DEED POLL for continuing or renewing a Partnership for a further Term, to be indorsed upon the Partnership Deed.*

To all to whom these presents shall come, the within-named A, B, C, and D send greeting. Whereas the term of fourteen years, mentioned and prescribed in and by the within-written indenture, for the continuance of the partnership thereby agreed to be entered into by and between the said parties, doth this day expire; but the said parties, considering that it would be for their mutual benefit and advantage to extend and prolong the said partnership, have agreed to continue partners in the within-mentioned trade, mystery, and business of lead-merchants, and in the manufactory and sale of all articles and things appertaining to the lead trade, henceforth, for the further term of seven years, upon the same terms and conditions, and subject to the same regulations, stipulations, provisions, and agreements, as are within expressed of and concerning the said partnership thereby created. Now these presents witness, and each of them the said A, B, C, and D doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the others and other of them, their and his executors and administrators, that they the said A, B, C, and D shall and will continue and be copartners in the copartnership trade or business in which they are now engaged under the within-written indenture, for the term of seven years hence next ensuing, and fully to be complete and ended, upon the same terms and conditions, and subject to the same regulations, stipulations, provisions, and agreements, in every respect, as are within expressed and declared, and in the same manner as if the within-mentioned copartnership term of fourteen years did not expire till the determination of the said term of seven years; and shall and will, during the said term of seven years, observe, perform, and keep the said conditions, regulations, stipulations, provisions, and agreements, in like manner as if the same were repeated or inserted in these presents. In witness, &c.

Agreement to continue copartnership.

Each partner covenants with the others, that the copartnership shall be continued for seven years, upon the terms contained in the deed of partnership.

## No. IV.

*DEED of RELEASE and ASSIGNMENT from a Retiring to a continuing Partner.*

Recital of the  
copartnership ;

that A has  
retired from the  
copartnership,  
and agreed to  
take ——— l.  
for his share,  
by instalments,  
with interest,  
to be secured  
by B's bond.

Recital of bond.

Release and  
assignment by  
A of his share  
in the joint  
effects.

THIS indenture made, &c. between A, of &c. of the one part, and B, of &c. of the other part. Whereas the said A and B have for several years past carried on, in copartnership together, the trade or business of booksellers and publishers: And whereas on the ——— day of ——— now last past, the said A, with the consent of the said B, retired from the said copartnership, and it was thereupon agreed that he should receive and take, in satisfaction of his share and interest in the said business, and the stock, monies, merchandises, debts, and effects, of or belonging to the same, the sum of ——— pounds, with interest for the same, after the rate of five pounds for one hundred by the year, to be computed from the said ——— day of ——— now last past, by the instalments, at the times, and in manner hereinafter mentioned; (that is to say,) the sum of ——— pounds, with interest thereon after the rate and to be computed as aforesaid, on the ——— day of ———; the sum of ——— pounds, with interest thereon after the rate and to be computed as aforesaid, on the ——— day of ———; and the sum of ——— pounds, with interest thereon after the rate and to be computed as aforesaid, on the ——— day of ———; and that the payment of the same several sums of ——— pounds, ——— pounds, and ——— pounds, with interest as aforesaid, should be secured by the bond of the said B in a sufficient penalty, and that the said A should execute and give the release and assignment, and power of attorney, hereinafter respectively contained: And whereas, in pursuance and part-performance of the said agreement, the said B has, by his certain bond or obligation in writing, bearing even date herewith, become bound to the said A, his executors and administrators, in the penal sum of ——— pounds, subject to a condition written under the said bond, for making the same void on payment by the said B, his heirs, executors, or administrators, or any of them, to the said A, his executors, administrators, or assigns, of the said several sums of ——— pounds, ——— pounds, and ——— pounds, with interest for the same respectively, after the rate and to be computed as aforesaid, by such instalments, at such times, and in such manner as therein expressed. Now this indenture witnesseth, that in pursuance and further performance of the said agreement, and in consideration of the premises, and of the sum of five shillings of lawful money of Great Britain, by the said B to the said A paid, at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said A doth by these presents grant, release, assign, transfer, and set over unto the said B, his executors, administrators, and assigns, all the part or share, estate, right, title, property, and interest whatsoever of him the said A, of, in, and to the stock in trade, debts, credits, capital, merchandises, and effects, and every



part thereof, of or belonging, or due and owing, to the said copartnership, on the said — day of — now last past, To have and to hold, receive and take, the said part or share, and all and singular other the premises hereby granted, released, and assigned, or intended so to be, and every part thereof, unto the said B, his executors, administrators, and assigns, for his own absolute use and benefit; but subject, nevertheless, to the payment and performance of the debts and engagements which have been contracted or entered into by or on the behalf of the said copartnership, and which on the said — day of — now last past remained unpaid and unperformed. And the said A doth hereby nominate, constitute, and appoint the said B to be the true and lawful attorney of him the said A, in his name alone, or in the name of him the said A jointly with the said B, to demand, sue for, recover and receive, of and from all and every the person or persons liable to deliver or pay the same, respectively, the stock in trade, monies, debts, credits, merchandises, and effects, belonging or due and owing to the said copartnership; and on the delivery or payment thereof, or of any part thereof respectively, to give, sign, and execute receipts, acquittances, releases, and other discharges for the same respectively; and on nondelivery and nonpayment thereof, or of any part thereof respectively, to commence and prosecute such actions, suits, or other proceedings, at law or in equity, for recovering or compelling the payment or delivery thereof respectively, as he the said B shall think proper; and also to adjust, settle, compound and compromise, all accounts, reckonings, transactions, and things whatsoever, relating to the said copartnership, or the business or affairs thereof; and generally to do and perform any other act, deed, matter, or thing whatsoever, relating to the premises, as fully and effectually, to all intents and purposes whatsoever, as the said A might or could do in his own proper person, in case these presents had not been executed, and the said A was personally acting therein; and whatsoever the said B shall lawfully do, or cause to be done, in and about the premises, the said A doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said B, his executors and administrators, to allow, ratify, and confirm. And the said A doth hereby, for himself, his heirs, executors, and administrators, covenant, declare, and agree with and to the said B, his executors, administrators, and assigns, that he the said A hath not, at any time heretofore, made, done, committed or executed, or knowingly or willingly permitted or suffered, any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof the said part or share, and premises hereby granted, released, and assigned, or intended so to be, are, is, can, shall, or may be in any wise impeached, charged, affected, or encumbered: and further, that he the said A, his executors or administrators, shall and will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said B, his executors, administrators, or assigns, make, do, and execute, or procure to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, matters, and

Power of attorney to get in the copartnership effects.

Covenant from A that he has done no act to encumber,

and for further assurance.

things, for the better and more effectually granting, releasing, assigning, and assuring the said part or share, and premises hereby granted, and released, and assigned, or intended so to be, unto the said B, his executors, administrators, and assigns, and for enabling him and them to recover and receive the same to and for his and their own use and benefit, according to the true intent and meaning of these presents, as by the said B, his executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably devised, or advised and required. In witness, &c.

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No. V.

*DEED of DISSOLUTION of a Partnership between Two Persons, where One of them continues to carry on the Business.*

Recital of  
articles of  
copartnership.

THIS Indenture, made, &c. between A, of, &c. of the one part, and B, of, &c. of the other part. Whereas, by articles of agreement bearing date the ——— day of ———, and made or expressed to be made between the said A of the one part, and the said B of the other part, they the said A and B mutually agreed to become partners together in the trade or business of a bookseller and stationer, under the firm of ———, for the term of twenty-one years, to be computed from the day of the date thereof, if the said A and B should so long live, but determinable nevertheless at any time during the said term, upon either of the said parties giving six calendar months' notice, in writing, to the other of them, of his desire to dissolve or discontinue the same; and it was by the said articles agreed, that upon such dissolution the accounts of the said copartnership should be settled and adjusted up to the day of the expiration of the said notice, in like manner as if the said copartnership had expired by effluxion of time, and that the estate and interest of the party giving such notice of and in the stock in trade, monies, debts, and effects of the said copartnership, should be taken by and assigned to the other of the said copartners at a fair valuation and appraisement, and that all proper deeds, conveyances, acts, matters, and things, should be made and done by and between the said parties, which should be requisite to carry such dissolution and assignment into effect: And whereas the said parties, in pursuance of the said recited articles of agreement, have carried on the said trade or business in copartnership together until the ——— day of ——— now last past: And whereas it has been agreed by and between the said A and B, that the copartnership subsisting between them under the said recited articles of agreement shall be dissolved from the day of the date hereof, and that the copartnership estate and effects shall be assigned to and henceforth become the property of the said B: And whereas, in pursuance and part-performance of the said agreement, the stock in trade and effects of the said copartnership have been valued and appraised at the sum of ——— pounds, with which valuation and appraisement the said A and B are respectively satisfied, as they do hereby respectively testify and

Agreement to  
dissolve the  
copartnership.

Valuation of  
stock in trade,  
&c. has been  
made;

declare; and it has been agreed that the said stock in trade and effects shall be taken by the said B, at the sum of ——— pounds, being one moiety of the said sum of ——— pounds, and paid for by him to the said A at the expiration of one year from the date of these presents; and that the said sum of ——— pounds shall be secured to the said A, by the bond or obligation in writing of him the said B: And whereas, in pursuance and further performance of the said agreement, the said B hath this day delivered to the said A his certain bond or obligation for securing to him the payment, at the time and in manner aforesaid, of the principal money so agreed to be secured to him as hereinbefore is mentioned and recited. Now this indenture witnesseth, that in pursuance and further performance of the said agreement, and in consideration of the premises, they the said A and B, with the mutual assent and consent of each other, do, by these presents, determine and dissolve the said copartnership in which they have been so engaged as hereinbefore is mentioned, as from the day of the date of these presents, and declare the same to be at an end, to all intents and purposes whatsoever, and that the covenants and agreements expressed and contained in the said hereinbefore recited articles of copartnership shall also cease and determine, as from the day of the date hereof. And this indenture further witnesseth, that in pursuance and further performance of the said agreement on the part of the said A, and in consideration of the premises, he the said A hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, sell, assign, transfer, and set over, unto the said B, his executors, administrators, and assigns, all that the moiety or half part, (the whole into two equal parts being considered as divided,) and all other the share and proportion of him the said A, of and in all and singular the joint stock in trade, goods, merchandises, estate, and effects whatsoever belonging to the said copartnership hereby dissolved, or to the said parties hereto in respect thereof; and also all and every the book and other debts, and sum and sums of money whatsoever, due and owing or belonging to the joint trade or copartnership, or to the said parties, or him the said A, on account thereof, and all the estate, right, title, interest, trust, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of him the said A, of, in, to, or concerning the same; and also of, in, to, or concerning the entirety of the said stock in trade, estate, and effects, and every or any part thereof, and of, in, and to all and singular the books of account, bills, notes, securities, and other papers and writings whatsoever relating thereto, or to any part thereof, or to the said joint trade or copartnership, To have and to hold the said moiety or half part, &c., or other share of or in the said stock in trade, debts, and effects, and all and singular other the premises hereby assigned or expressed, or intended so to be, unto him the said B, his executors, administrators, and assigns, to and for his and their own proper use and benefit, absolutely and for ever. And the said A doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said B, his executors, administrators, and assigns, in manner following; (that is to say,) that all monies, debts, and other effects, which are now belonging or due or owing to the said copartnership, so hereby dissolved as

which is to be taken by B at a certain sum,

to be secured by his bond.

First witnessing part.

Dissolution of the copartnership.

Second witnessing part.

A assigns his share of the stock, &c. to B.

Covenant that debts, &c. shall be got in by B;



that A will not  
obstruct him in  
the receipt  
thereof ;

that A will  
execute further  
assurances ;

B will pay  
debts, and  
indemnify ;

aforesaid, shall be received, collected, and got in by the said B, his executors, administrators, or assigns, at the sole risk and costs of him the said B ; and that for that purpose the said B, his executors, administrators, and assigns, shall and may commence, take, and adopt such actions, suits, measures, and proceedings, as to him or them shall seem expedient and proper ; and that for the better enabling him and them to receive, collect, get in, and recover the same monies, debts, and effects, he the said A, his executors and administrators, shall and will, from time to time, and at all times hereafter, permit and suffer his or their name or names to be made use of in all actions, suits, and other proceedings whatsoever, which shall or may be commenced or prosecuted by him the said B in relation thereto, in such manner and form as he the said B, his executors, administrators, or assigns, or his or their counsel learned in the law, shall reasonably require in that behalf, (he the said A being from time to time well and satisfactorily saved harmless, and indemnified from and against all costs, damages, and expenses by reason thereof) ; and that he the said A, his executors and administrators, shall not, nor will, at any time or times hereafter, by himself or themselves respectively, or by any agent or agents, receive or take into his or their, or any of their possession, any of the same monies, debts, and effects, or any part thereof respectively, nor release or discharge the same, or any of them, nor release, discontinue, or become nonsuit in any action or suit which shall be brought or commenced for the recovery of the same monies, debts, and effects, or any of them, or any part thereof respectively, without the consent in writing of the said B, his executors, administrators, or assigns, for that purpose first had and obtained, nor do, execute, commit, or suffer, or be party or privy to any act, deed, matter, or thing whatsoever, whereby or by means whereof the said B, his executors, administrators, or assigns, shall be hindered or obstructed from receiving, collecting, getting in, or recovering the said monies, debts, and effects, or any of them, or any part thereof ; and further, that he the said A, his executors and administrators, shall and will, from time to time, and at all times hereafter, at the request, costs, and charges in the law of the said B, his executors, administrators, and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, assignments, conveyances, assurances, matters, and things whatsoever, not only for the further and more perfectly or satisfactorily assigning and assuring the part or share, and premises, hereby assigned, or expressed, or intended so to be, unto the said B, his executors, administrators, and assigns, but also for the better enabling him and them to recover, receive, possess, and enjoy the same, to and for his and their own proper use and benefit, according to the true intent and meaning of these presents. And the said B, for himself, his heirs, executors and administrators, doth hereby covenant, promise, and agree, with and to the said A., his executors and administrators, that he the said B, his executors, administrators, and assigns, shall and will well and truly pay and satisfy, or cause to be paid and satisfied, all and every the debt and debts, and sum and sums of money, bill and bills of exchange, dues, claims, and lawful demands whatsoever,

which now is or are, or which shall or may at any time hereafter be or become, due or payable by or from them the said A and B, or either of them, for or in respect of the said copartnership, or the stock or effects thereof, and shall and will, from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless and indemnified, him the said A, his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, of and from the same, and of and from all and all manner of actions, suits, and other proceedings whatsoever, which shall or may be had or prosecuted against him the said A, his executors or administrators, either solely, or jointly with the said B, his executors or administrators, in respect thereof; and shall and will, from time to time and at all times hereafter, at the reasonable request, and at the costs and charges of the said A, his executors, administrators, and assigns, produce and show forth unto him or them, or to any other person or persons by him or them lawfully authorised in that behalf, or permit and suffer him, them, or any of them, at the counting-house of the said B, to take copies or abstracts of all, every, or any receipts, acquittances, discharges, documents, and evidences of any payment or payments made of, for, or on account of any debt or sum now due, or growing or becoming due, from the said copartnership, or him the said A in respect thereof, for the purpose of manifesting and authenticating the payment of the same. And also that he the said B, his executors or administrators, shall and will well and truly pay, or cause to be paid, unto the said A, his executors, administrators, or assigns, the said sum of — pounds, for which the said bond of him the said B was so given as aforesaid, at the time therein appointed for the payment of the same. And further, that he the said B, his executors, administrators, and assigns, shall and will, from time to time, and all times hereafter, save harmless and keep indemnified the said A, his heirs, executors, and administrators, from and against all costs, charges, damages, and expenses, which he or they shall sustain or be put unto, or be liable to sustain or be put unto, by reason or on account of his or their name or names being used in any action or proceeding, or other matter or thing, in pursuance of the power hereinbefore for that purpose contained, or otherwise, on account of the assignment hereinbefore made. And this indenture lastly witnesseth, that in pursuance and further performance of the said agreement, and in consideration of the premises, each of them the said A and B hath acquitted, released, and for ever discharged, and by these presents doth acquit, release, and for ever discharge, the other of them, his heirs, executors, and administrators, and his and their estates and effects whatsoever and wheresoever, of and from all actions, suits, claims, and demands whatsoever, which he hath, or otherwise might or could have against or upon the other of them, his heirs, executors, or administrators, and his and their estates and effects whatsoever and wheresoever, for, or by reason, or on account of the said copartnership hereby dissolved as aforesaid, or for, or by reason, or on account of any act, deed, matter, or thing whatsoever in any wise relating thereto, other than and except such actions, suits, claims, and demands, as shall or may arise upon, or by virtue of these presents. In witness, &c.

and produce  
vouchers;

and discharge  
bond;

and indemnify  
A against his  
name being  
used.

Fourth wit-  
nessing part.

Mutual  
releases.

## No. VI.

## NATUSCH v. IRVING AND OTHERS.

THE plaintiff, on the behalf of himself and all others the shareholders, members, or partners of the *Alliance British and Foreign Life and Fire Assurance Company*, filed this bill against the defendants, who were the presidents and directors of that company, praying, amongst other things, a dissolution of the partnership, and, if necessary, a receiver, and an injunction to restrain the defendants, and the clerks, agents, and servants of the company, from effecting marine insurances, or transacting the business of underwriting or insuring ships, or their cargoes or freight, against the perils of the sea, and from lending money on bottomry, in the name or on the account of the company, and from using the name of the company for such purposes, and also from carrying on the business of underwriting or lending money on bottomry in any other name or firm at the place of business where the business of the company had been hitherto carried on, and from applying the capital of the company to any of such purposes.

The bill stated, that in the month of *February* 1824 the defendant *Rothschild* set on foot a plan for the formation of the above-mentioned company, intimating that applications for shares were to be made to himself or to his agent *Mr. Cohen*. The plaintiff shortly afterwards applied to become a shareholder, and received from *Rothschild* the following answer:—"2. *New Court, Swithin's Lane*, 15th *March* 1824.—I beg to refer you to the annexed prospectus, and to inform you that your name is inserted for fifteen shares in the *Alliance British and Foreign Life and Fire Assurance Company*. You will please to pay, on or before *Friday* the 19th instant, 10*l.* per share at the company's office, *pro tempore*, No. 4. *New Court, Swithin's Lane*. The success of all establishments of this description must necessarily depend upon the individual exertions of the proprietary, but calculating (as the presidents and directors confidently do) upon such exertions on the part both of their foreign and British shareholders, they feel no hesitation in predicting that this institution will speedily become one of the first in *Europe* both in profit and utility." The prospectus which accompanied this letter was headed and entitled, "*The Alliance British and Foreign Fire and Life Assurance Company*, capital 5,000,000*l.* sterling," and stated the defendants to be the presidents and directors of the company. The body of it was thus expressed:—"The object of this institution is to combine the highest public utility with the greatest individual benefit to the proprietors. It is confidently expected this will be attained in a greater degree than has ever yet been realized, owing to the extensive connections, both foreign and domestic, of the parties with whom the company originates, and the large capital to be invested therein, by means of which the company will be able to avail



itself of every opportunity beneficial to its interests, and to defray its expenses with the least possible diminution of profits. The following is an outline of the plan upon which the institution is intended to be conducted, which plan will be further matured by the presidents and directors, under the ablest legal and professional advice, and will be completed in such a way as counsel may recommend; and the shares are tendered to the parties, who have offered to subscribe for them, upon this express condition, that all further details shall remain with the presidents and directors, and that the shareholders shall execute such deed or deeds as may be deemed requisite." The prospectus then stated, amongst other things, that the capital was to be divided into fifty thousand 100*l.* shares; that every shareholder, as the condition of holding his shares, would be required to insure a sum equal to the amount of his subscription in the Fire, or 1000*l.* in the Life department of the company; and that the company would commence business on *Tuesday* the 23d of *March* 1824, under the conduct of the five presidents and sixteen directors (those presidents and directors being the defendants), who would unitedly form the Board of Direction. After many other details which it is unnecessary here to enumerate, the prospectus proceeded in these words: "In addition to the specified objects of the institution, namely Fire and Life assurances, it is intended that the company shall grant life annuities, endowments for infants, and benefit policies in all cases connected with life contingencies, and shall avail itself of the advantage continually offering in the purchase of life contingent risks, and such other descriptions of property as the law may sanction." On the faith of the representations contained in the prospectus, the plaintiff accepted the offer of the fifteen shares, and on the 19th *March* he paid at the company's office the sum of 150*l.*, being the amount of the call of 10*l.* on each of his shares. On that occasion he received a printed certificate as follows: "*Alliance British and Foreign Life and Fire Assurance Company, No. 4. New Court, St. Swithin's Lane.* Capital, five millions sterling. This is to certify that *Frederick Natusch, Esq. of St. Swithin's Lane*, has become a subscriber for fifteen shares of 100*l.* each in the *Alliance British and Foreign Life and Fire Assurance Company*, on which ten pounds per cent. have been paid, and that on executing such deed or deeds as the Board of Direction shall deem requisite for furthering the objects stated in the prospectus, the said *Frederick Natusch, Esq.*, will be entitled as a proprietor of the said shares to all the benefits and emoluments thereof. This certificate to be void, and the deposit to be forfeited, on failure to execute such deed or deeds within three months after notice in the *London Gazette.* *London, 24th March, 1824.* — *N. M. Rothschild* entered in the company's books L. D., (no assignment is valid unless regularly made in the books of the company) No. 35,220 and 35,234." The plaintiff also effected an assurance on his life for the sum of 1500*l.*, and on the 31st of *March* he paid the premium required for such assurance.

On the 27th *August* 1824, advertisements appeared in some of the public papers, which purported that the *Alliance Company* would, on the 1st of *September*, commence the business of marine

insurance, and the plaintiff in consequence wrote on the same day to *Mr. Hamilton*, the secretary of the company, requesting to be informed whether the fact was so; and stating that he conceived such a proceeding would materially affect his interest, not only as a partner, but in respect of the contract of insurance he had effected with the company on his life. To this letter he on the 30th of the same month received the following answer from the secretary: — “I have laid your letter of the 27th *instant* before the Board of Direction of the *Alliance Company*, and am desired by them to return you the following answer to it. The rumour to which you allude is well founded — the company will commence marine assurance business on the 1st of *September*. The Board, however, do not conceive that your interest can be prejudiced by this determination. It is true that 15 shares were assigned to you by *Mr. Rothschild* at your particular request, upon which shares you have paid a deposit of 10*l.* per cent.; but as you have not executed the deed of settlement, and as your name is not enrolled under the act, you are not subjected to any of the liabilities attached to the company. If you are dissatisfied with the course intended to be pursued, you may receive back your deposit with interest from the date of its payment; and the Board request you will consider this as a regular tender thereof. With regard to the insurance effected by you on your life, and which (looking either at the date of the proposal for or of the completion of it) must have been so effected, with knowledge on your part that the company intended to carry on the business of marine insurance, the Board are ready and willing to cancel the policy, and return the premium, and to assist you in transferring your assurance to any other office in whose solidity you may have more confidence than in that of the *Alliance*.” After receiving this communication, the plaintiff on the 31st *August* rejoined as follows: “Your information, that I have not executed the deed of settlement, was the first notice I had received that any such deed had been prepared (*a*), and upon that part of the subject it is unnecessary to say more, than that I am ready to execute any deed, in conformity with the prospectus annexed to the receipt signed by *Mr. Rothschild* for my deposit. The arrangement respecting the enrolment I do not understand, and therefore do not enter into it. It is, I conceive, competent to me to insist, that the business in which I am a partner shall be carried on according to the agreement which united the partners together; and I cannot think my doing so will entitle the managers of that partnership to pay me out my capital, and deprive me of a share in a concern of which I have the highest opinion. And therefore I do most respectfully, but most decidedly, require that the presidents and directors abstain from any contracts or engagements relating to marine insurance, as not being contemplated by myself and those who joined the company upon the terms of the prospectus referred to; and I, as decidedly, require an undivided attention, on the part of the managers and the officers of the institution, to the

(*a*) It was stated in the bill that notice of a deed having been prepared was inserted in the *London Gazette* of the 10th of *August*, but that the plaintiff had not at the time seen or heard of it.

objects defined in the prospectus referred to. In answer to the last paragraph of your letter, I beg to state that, so early as *February* last, I offered to insure my own life with the *Alliance Company*, so soon as the arrangements could be completed, and that neither then nor at any subsequent period did I conceive that it was in the power of the managers to undertake risks foreign to the purpose for which the company was formed. As to marine insurances, my own determination not to be involved in them, as a member of the *Alliance* partnership, was very impressively stated to Mr. *Rothschild*, on occasion of an interview had with him by his own desire on the subject of my petition to Parliament. The presidents and directors will do me the justice to feel that my conduct has been plain and consistent. I have throughout approved the institution as a partnership for life and fire insurance and the purchase of annuities, and as distinctly disapproved the dangerous business of marine insurance being appended. I have therefore endeavoured, and shall continue to preserve my full share of the full benefit to be derived from the former, in a distinct insulated exertion of the influence of the partners; and I have resisted, and shall to the utmost of my power oppose, the latter unauthorized employment of the capital of the company, and the time and talents of its managers and officers." The plaintiff subsequently attended for the purpose of executing the deed of settlement; but, on discovering that the only deed prepared for execution by the subscribers was one which contained a recital of the repeal of so much of the act of the 6 Geo. 1. (a) as prohibited the effecting of marine assurances by partnerships or companies, and that it was intended to extend the objects of the *Alliance Company* to marine insurances and lending money on bottomry, and that the deed contained the necessary provisions for enabling the company to carry on such business, he refused to execute it, as not being conformable to the terms on which the company was formed. In pursuance of the advertisements, the defendants, on the 1st of *September* 1824, commenced, and, at the time of the filing of the bill, continued to carry on the business of underwriting.

The bill, — after stating the various facts already mentioned, the willingness of the plaintiff to execute any deed which the defendants might lawfully require for furthering the objects stated in the prospectus, and denying that he acquiesced in and submitted to the intention of the defendants to extend the business and transactions of the company to marine insurance, and to the lending of money on bottomry, — charged, that a deed containing provisions for enabling the defendants, as presidents and directors of the company, to undertake the business of marine insurance, was not a deed of settlement authorised by the terms upon which the company was formed; that the engaging in such business would render all the members of the company liable to the bankrupt laws, though not otherwise subject thereto; that all the defendants, other than *Rothschild*, were privy and assented to the publishing of the prospectus, and authorised the writing of the

(a) 5 Geo. 4. c. 114. This act received the royal assent on the 24th June 1824.



letter of the said *Rothschild*, and adopted all his acts; that various copies of the prospectus were circulated by and under the directions of the defendants; and that the extension of the transactions and business of the company to marine insurance or underwriting was in direct contravention with the true and obvious construction and whole scope of the prospectus and other documents.

The injunction was applied for, before answer, upon the usual certificate and affidavit. Counter affidavits were produced on the part of the defendants, by one of which it was stated, that, shortly after it had been determined to form the *Alliance Company*, the existence of an intention to apply for an act of parliament or charter, enabling the company to effect marine insurances, was currently reported, and was a common subject of conversation amongst mercantile men. The affidavit also alleged that, about the end of *March*, 1824, repeated allusions were made to the same subject in the daily papers, and further it stated circumstances which would lead to the inference, that the plaintiff must, about the time he became a shareholder, have been aware of the determination of the defendants to extend the objects of the company to marine insurance. It was likewise insinuated that the suit was instigated and promoted by the committee of underwriters at *Lloyd's*, and that it was intended that the costs and expenses thereof should be borne and paid by them. The injunction being asked, the *Lord Chancellor* directed the plaintiff to answer the affidavits filed for the defendants, with liberty for them to reply, and the defendants were ordered to discontinue their advertisements in the mean time, and to confine their business to as few risks as possible. In consequence of this direction the plaintiff filed a further affidavit, in which he denied having received any notice or intimation, at or before the time he became a shareholder, that the business of marine insurance was to form one of the objects of the company. He also stated therein that, on the 5th *June*, 1824, after the bill for the repeal of the act of the 6 *Geo. 1.* had been read a second time in the House of Commons, he had an interview with the defendant *Rothschild*, and then explained in very strong terms his opinion of the danger and impolicy of a joint stock company undertaking the risks of marine insurance; and at the same time intimated his entire disapprobation of the company engaging in such business, and his determination to oppose the same by every legal means. He likewise stated, that so far from having either directly or indirectly acquiesced in the company's engaging in the business of underwriting, he not only remonstrated with the defendant *Rothschild* on the subject, but took an active part in opposing every measure tending to enable the company to engage in such business. Other affidavits were filed on the part of the plaintiff, in one of which it was alleged, that, so far from its being a matter of notoriety that the defendants intended to add the business of marine insurance to the objects specified in the prospectus, the solicitor employed for the company, in the course of passing a bill introduced into the House of Lords for the purpose of enabling the company to sue and be sued in the name of their

chairman, cautiously abstained from avowing any such intention ; and in answer to a question addressed to him before a committee of Peers on the said bill, whether it was intended that the company should engage in the business of marine insurance, he replied, that he knew nothing except in his professional capacity of solicitor to the company, and submitted that he was not bound to disclose what came to his knowledge in that character. The remainder of the affidavits produced for the plaintiff were made by shareholders in the company, who asserted that they became such shareholders upon the faith and credit of the prospectus, in which the business and objects of the company were confined to fire and life insurance, and other life risks, and that they wholly disapproved of and never acquiesced in the extension of the concerns of the company to maritime insurance. The defendants filed counter-affidavits, and amongst them one by the defendant *Rothschild*, in which he insisted that the plaintiff could not, in offering to become a shareholder, have relied upon the statements in the prospectus, because at that time the prospectus was not prepared, and it was not issued and made public until the 15th of *March*. He admitted having had an interview with the plaintiff, at which the plaintiff objected to the company extending its operations to marine insurance, but denied that the plaintiff stated his opinion of the danger or impolicy of a joint stock company undertaking the risks of marine insurance. The points relied upon by the defendants, as affording particular answers to the plaintiff's bill, are noticed *seriatim* by the *Lord Chancellor*, and it is therefore unnecessary to repeat them here. His lordship being furnished with all the papers, was pleased, in *Trinity* vacation, 1824, to forward from the country the following remarks upon the case : —

“ The repeal of the act of George I. put an end to the disabilities imposed upon societies or partnerships as to underwriting against marine risks.

“ That repeal could not, I think, operate to change the rules of law or equity, which, as rules governing partnerships, would have regulated their concerns among themselves, if such repealed act had never existed.

“ If the *Alliance Company*, which the act of the 17th *June*, 1824 (*a*), treats as *then* formed to effect assurances upon *lives* and *survivorships*, and against *loss or damage by fire*, and represents that several persons *had* formed themselves into a company, and raised considerable sums of money in order to effect *such* assurances, could not by express contract, or authority by implication vested in its directors, or any select part of its body, engage the partners in marine risks ; and if the plaintiff, on behalf of himself and others, had a right to prevent the company, AS THAT COMPANY, from so doing, several points are made on the part of the defendants against the plaintiff, as such points as ought to operate to discharge his complaint.

“ 1. It is urged that the plaintiff has not executed the deed of settlement. To this it may be answered, that if the company

(a) 5 Geo. 4. c. 137.

had no right to engage him in marine risks, they had no right to tender to him for execution any deed which did so engage him; and that if the prospectus and certificate are to be considered as evidences of the partnership contract, the certificate allows *three* months after notice in the *London Gazette* for execution. The deed was not lying for execution till the 10th *August* in Mr. *Pearce's* office. The plaintiff represents that his information that there was such a deed was received from Mr. *Hamilton's* letter of the 30th *August*. (a)

"2. That the plaintiff's name not being enrolled under the act, he is not subject to any of the liabilities attached to the company. This does not appear to be the true construction of the act. A memorial of the several members is only required to be enrolled within six months; and if the act is to be taken to require enrolment sooner, non-observance of the act could not free the party neglecting to observe it from liabilities. The act provides, that no action shall be brought *under the authority of the act* by the company till there has been an enrolment, but it does not negative proceedings against the company or its members, and the 7th section seems to proceed upon that distinction. If this notion, that a person subscribing, but of whose name a memorial has not been enrolled, was countenanced, it would perhaps be a little difficult to determine who are the partners now subject to liabilities, it not appearing how many of the 340 who have executed the deed in respect of 22,400 shares (b), or how many of the members entitled to the residue of the 50,000 shares, have or have not had their names enrolled.

"3. An offer is made to the plaintiff that he may receive back his deposit with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by *compelling* them to retire upon such terms, so to form a *new company*. This would as to partnerships, be a most dangerous doctrine. Where a partnership is dissolved (even where it can be *in a sense* dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership existing at the time of the dissolution, as beneficially as may be for

(a) In the margin of the manuscript his lordship wrote as follows: "It seems to me that this must be understood to be a deed relative to fire and life assurances, and the other specified objects, and those only, however great might be the powers given by it to any part of the body with respect to such objects. Mr. *Rothschild's* certificate does not, it may be said, give the title to benefits and emoluments till the deed is executed, but then it must be a proper deed relating to the specified objects; and in law a person may, by his own fault, be subject to liabilities, though not entitled to emoluments."

(b) It was stated in the affidavits that upwards of 340 members, holding together upwards of 22,400 shares, had executed the deed of settlement.



the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him, to whom they have given an offer of his deposit and interest, *Take that, and we are a new company*, keeping the effects, means, assets and property of the old, as the property of the new partnership.

“ 4. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in.

“ 5. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares.

“ Upon the whole, I do not find that, upon taking the supposition in page 1. to be true, in law there is any sufficient matter contained in the above points made in the affidavits on the part of the defendants.

“ The repeal of the act 6 Geo. 1. which merely made it lawful for societies or partnerships, however numerous their members might be, to insure against marine risks, could not make it lawful for companies or societies, which were formed for specified purposes of insurances upon lives and against fire, to insure against marine risks, unless the contracts by which such companies were formed, either expressly or impliedly (where individual partners did not consent to embarking in new projects, either originally or subsequently to the formation of the companies), created an authority in some part of the body to bind all the body to the adoption of such new undertakings.

“ Upon the best consideration I can give this case, I think the original contract of this society was to form a life and fire assurance company; and that in the original institution the objects are all specified, except what fall under the general words, ‘ *the purchase of such other descriptions of property as the law may sanction.*’ At that time the law did not sanction marine insurances by such a body. It might never sanction them. The words ‘ *purchase of* ’ will probably be taken as connected with the words ‘ *such other descriptions of property as the law may sanction,*’ and the general words be taken to mean things *ejusdem generis*. If it was thought that the prospectus had a reference to marine insurances, there could be no reason for a non-avowal of the purpose so to insure, when the matter was before Parliament. It is intimated in an affidavit that the prospectus ought not to be considered as forming the plan of the institution, but there seems to be enough in the affidavits to prove that it did; and if Mr. Rothschild is right in intimating that it did not, it seems difficult to maintain what

adventures the directors may not engage this company to undertake.

“ For such and other reasons the matter has been also discussed before me upon the ground, that by reason of the plaintiff’s acquiescence in the extension of the plan, he is not (whether others are or are not, upon a bill filed by him, it is said is not material) at liberty to contravene the purpose of extending the transactions of the company to marine insurances, and this deserves much consideration.

“ If six persons joined in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent.

“ But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, and clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have *acquiesced* in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners, so engaged, in difficulties and embarrassments, unless they were permitted to proceed in the farther execution of such projects, if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction.

“ It may be taken that the principle that would apply to the partnership of six, will apply to this partnership of 600 or 700; 340 have executed in respect of not quite half the number of shares: there probably may be therefore 600 or 700 members. To those who have not had occasion to observe the boldness of speculation, it may seem astonishing that persons, and so many in number, should have engaged themselves in a speculation so little explained, and undertaken to execute deeds, of the contents of which they had so little information. To those who know the difficulty of applying the rules of law and equity to societies constituted of such numbers of persons not incorporated, it is not matter of surprise that persons, ignorant of those difficulties, should become members of such societies; it may be matter of surprise to them, that persons who know the difficulty of applying those rules should become members, even where the nature of the speculation is clearly explained, and full information is given of the contents of the deeds to be executed. Much has been done with respect to the difficulty alluded to, by provisions how those who have demands upon such societies are to sue, and how such societies are to be sued; much remains to be done, and particularly as to rendering simple and effectual the remedies of the members of such societies against each other. It is observed that the members of this society *underwriting* will be each liable to the bank-

rupt laws. That depends upon the act of parliament which is to take effect in *May* next. (a) Shares may devolve to feme coverts, infants, &c. ; but whatever are the difficulties, courts must struggle to remedy them, and to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six must, as far as the nature of things will admit, be applied to a partnership of 600.

"I have read the affidavits originally and since sent to me, repeatedly and with great attention. Since I received the latter, it has been impossible for me, in point of time, to put together (even as cursorily as I have written without time to correct them) the preceding observations. (b) The present impression upon my mind is, that in a matter important as this certainly is, it may be difficult to arrive at a conclusion perfectly satisfactory, when it is to be formed without the opportunity of calling for explanations, which a hearing in town would afford. As I read the affidavits, and on repeatedly reading them, such explanations, it appears to me, may be necessary. They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce. To determine whether this is made out requires a very accurate and critical attention to every word in the affidavits, and to the want of words in them. To exemplify this, the plaintiff in his affidavit states, that after the bill had been read a second time in the House of Commons, he had an interview with Mr. *Rothschild* ; that he stated to him in strong terms his opinion of the danger of the undertaking, his reasons for that opinion, his entire disapprobation of the company engaging in marine insurances, and he swears that he expressed *his determination to oppose the same by every legal means*. Mr. *Rothschild* in his affidavit admits, that in the conversation the plaintiff objected ; he denies that he stated his opinion of the danger, but he omits entirely to notice, whether the plaintiff did or did not (as he swears he did) express *his determination to oppose the same by all legal means*, an expression, both as to its nature and the time when it was made, extremely important.

"So again the plaintiff states in his affidavit, that he believes the presidents and directors took upon themselves such offices, and were privy to and assented to the publishing the prospectus, and authorised the writing of the said letter of the said *Nathan Meyer Rothschild*, and have ever since acted as presidents and directors. To this I find no contradiction. (c)

(a) 5 Geo. 4. c. 98. s. 2. by which an underwriter is declared to be a trader liable to the bankrupt laws, and see 6 Geo. 4. c. 16. s. 2. Formerly it was held that an underwriter, merely in that character, could not be a bankrupt. *Ex parte Bell*, 15 Ves. 355.

(b) This sentence was literally transcribed from the copy of the observations with which I was furnished.

(c) The Lord Chancellor observed in the margin, "A statement to Mr. *Rothschild*, it may be contended, is in effect a statement to the presidents and directors."



“On the other hand, though it is no objection to the plaintiff that he is an underwriter at *Lloyd's*, yet it may deserve consideration, whether he is really suing for himself, or for the members of *Lloyd's*, not members of this company. Respectable the members of *Lloyd's* are, but it is alleged that the plaintiff's suit is their suit, that he is suing at their cost and charges; this is not negatived, and it may be material.

“It will require some time to analyse with sufficient particularity the affidavits. That time I have not had, and after it has been had, probably more information must be called for. I wish, therefore, to know by post whether the parties can make any arrangement, by indemnities to the plaintiff in the mean time or otherwise, which would give the court the opportunity of publicly hearing this matter when it meets, having then the advantage of counsel, and such further information as both parties can give. If they cannot agree upon some such arrangement, I shall proceed to state the effect of the affidavits as they strike me, and either deny the injunction or grant it, or order some *interim* arrangement, as soon as I hear from them, and have time sufficient for the purpose.

“ELDON, C.”

Additional affidavits were subsequently filed, both on the behalf of the plaintiff and of the defendants, with the view of supplying the omissions suggested by his lordship, and the injunction was granted. A new company was afterwards formed for the purpose of engaging in marine insurances.

## I N D E X.

## ABATEMENT.

Where one partner is improperly omitted as a plaintiff in an action on a contract, the defendant may, but is not obliged to plead the nonjoinder in abatement, 134, 135.

but where one of several, who ought to join in an action of tort, is omitted, the matter must be pleaded in abatement, 136.

if one of several part-owners sue alone for a tort, and the defendant do not plead in abatement, the other part-owners may afterwards sue separately, 137.

partner guilty of fraud, in respect of the particular contract, cannot plead in abatement, 159. 166. n.

in actions on contracts against partners, the nonjoinder of any of them must be pleaded in abatement, 165—170.

the objection cannot otherwise be made available, 167.

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in actions on joint bonds, deeds, or bills of exchange, a single contractor, who is sued, must plead in abatement, *ibid.*

rule applies to an action of debt on stat. 9 Anne, c. 14., 170.

plea in abatement not necessary where the plaintiff sets out in the pleadings a joint contract, *ibid.*

and shews that the contractors not joined are alive, *ibid.*

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a partner who has become a bankrupt and obtained his certificate, must be joined, if the other partners plead his nonjoinder in abatement, 175.

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so he may prove that the defendant was authorised, 202.

## ACCOUNT.

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when partners, carrying on the trade after a dissolution with the partnership effects, must account to the others for their shares of the profits made, 255.

joint creditors are not entitled to an account of the property of a partnership, of which an uncertificated bankrupt was a member, against the assignees under the first commission, 261. n.

solvent partner carrying on trade with the joint capital after the bankruptcy of his partner, must account to the assignees for their share of the profits, 302.

and, under such circumstances, the surviving partner must account to the representatives of the deceased partner, 354.

how a defendant must proceed where the plaintiffs, calling for an account, have got all the vouchers, 357.

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- or if the partnership is otherwise materially altered, 124.
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a broker employed to sell goods on an agreement that he shall have all he can procure for them beyond a stated sum is not a partner, 19.

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One partner may sign a bankrupt's certificate either during the partnership or after a dissolution, 68.

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- what is notice of a change in a firm of bankers, 249.
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JOINT DEBTS. See tit. DEBTS.

JOINT ESTATE. See tit. PROPERTY AND POSSESSION.

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- laws relating to unincorporated companies the same as in ordinary partnerships, *ibid.*
- each member is liable for the company's debts, 3. 17.
- incorporated companies are not to be considered ordinary partnerships, 3.
- a company cannot engage in adventures not originally contemplated without the consent of all the members, 7.
- nor, in order to do so, compel a dissenting member to receive his subscribed capital and interest and withdraw, *ibid.*



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- each member is liable to contribute towards what the manager may have paid, 17. 80.
- when a subscriber to a scheme may recover back his subscription at law, 76.
- how the expenses of bringing a scheme into operation are to be borne, 77. and note *ibid.*
- a member of a company cannot sue the other members of the company for work and labour, 78.
- nor on a bill drawn upon the directors of the company, and accepted by their secretary, *ibid.*
- where a shareholder enters into an agreement with the directors, with a clause exempting them from personal liability on certain parts of it, he may sue them on the other parts, *ibid.*
- an unincorporated company, acting, or assuming to act, in a corporate character, is not entitled to relief in equity, 94.
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## LIEN.

On a dissolution of partnership, if one partner *bonâ fide* transfers his interest to the other who becomes a bankrupt, the joint creditors have no lien, 238. 254. 267—271.

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- for the payment of debts, the other partner has no lien on those articles if the fund prove deficient, 239.
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- when the statute may be pleaded in equity in bar of the relief, 102.
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- of money to one partner, and a subsequent loan of it by him to the firm, does not create a debt as between the original lender and the firm, 283.
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LONDON :  
Printed by A. & R. Spottiswoode,  
New-Street-Square.

A  
SUPPLEMENT  
TO THE  
LAW OF PARTNERSHIP,  
CONTAINING  
ALL THE NEW DECISIONS  
TO  
THE PRESENT PERIOD.

BY NEIL GOW, ESQ.  
OF LINCOLN'S INN, BARRISTER AT LAW.

LONDON:  
JOHN RICHARDS AND CO., LAW-BOOKSELLERS,  
194. FLEET-STREET.  
1841.

London:  
Printed by A. STOTTISWOOD,  
New-Street-Square.



## ADVERTISEMENT.

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IN the following Supplement will be found the cases relating to ordinary partnerships, that have been decided since the publication of the last edition of the treatise ; as well as many statutes, and most of the new decisions affecting banking and other joint-stock companies. The author trusts this appendage to the work will be considered useful.

11. Furnival's Inn,  
January, 1841.



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# SUPPLEMENT

TO THE

## LAW OF PARTNERSHIP.

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### CHAPTER I.

#### OF THE CONTRACT OF PARTNERSHIP.

##### Page 2. line 2.

A FATHER may settle his infant son as a partner, without subjecting himself to responsibility, if he personally derives no advantage, and has not reserved to himself the power of drawing the profits, or calling the partners to account, or having the profits paid to him as a trustee. Thus, in *Barklie v. Scott* (a), it appeared that a father, on the formation of a partnership, invested a sum of money in the partnership firm on behalf of his son, who was a minor; and it was stipulated that the other partners should account with the father, as the trustee of his son, for one third profit of his son's capital, or any loss that might accrue, and should be governed and directed by his advice in all matters relative to the business. It was determined that this did not constitute the father a partner, the jury having found that the money was not invested by him for his own benefit, and that he had not reserved to himself the power of drawing out the principal or profits, as trustee for his son.

##### Page 4. line 5.

A partnership cannot be forced upon a party without his consent, or against his expressed will. In *Ex parte Barrow* (b), Lord Eldon said, "A man may become a partner with B. where A. and

(a) 1 Hudson & Brooks's Rep. K. B. *Ireland*, 83.

(b) 2 Rose, 252.

B. are partners, and yet not be a member of the partnership which exists between A. and B." No partner can be named for another; no one can be put upon another as a partner without his consent. To make a person a partner with others, their consent must clearly be had, but there is no particular mode or time required of giving that consent; and, if three enter into partnership by a contract which provides, that on one retiring, one of the remaining two, or even a fourth person, who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be a valid contract, which a court of equity must perform, and that the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name. (a)

Page 9. note (b).

The case of *Williams v. Jones* (b), decided that the date of the deed of partnership fixes the commencement of the liabilities of the partners where no other time is mentioned. But in *Vere v. Ashby* (c), there was an agreement entered into on the 24th of June, 1824, for a partnership between a firm of two, and a third person, containing a stipulation that it should have a by-gone operation from the 18th of May preceding; and it was held, that the liability of the new partner did not attach as to contracts made in the intermediate time, the retrospective date of the partnership being a bargain between himself and his partners, and making no pledge of his credit to third persons. Where, however, an agreement for a partnership was made previously to the 1st of January, 1838, and a deed of partnership was in consequence prepared, bearing date on that day, but not executed until the 18th, and containing a stipulation that, as between the partners themselves, the partnership should be taken to have commenced on the first mentioned day, it was determined that the partnership was in existence for all purposes between the 1st and the 18th, and that each of the partners was liable for goods supplied to the partnership between the two periods. (d) *Bosanquet J.*, in the course of his judgment, observed, that had the question depended merely on the deed, he should have thought there had been no partnership until the

(a) *Per Lord Brougham, Lovegrove v. Nelson*, 3 Mylne & Keen, 20.

(b) 5 B. & C. 108.

(c) 10 B. & C. 289.

(d) *Battley v. Bailey*, 4 Jurist, 537.



18th, but that the liability of the parties to the previous agreement, *quâ* partners, resulted from their having acted upon that agreement, without reference to the inquiry whether a deed had been executed or not.

Page 16. line 14.

Where trustees, by virtue of a deed of assignment made to them by their debtor, carry on the trade of their debtor, upon trust out of the profits thereof, after paying the expences of the assignment and of carrying on the business, to retain and pay the surplus profits to and among themselves and the other creditors executing the deed, the trustees and creditors, who execute the deed, are partners in the business carried on for the purposes of the trusts. (*a*)

Page 27. line 14.

By the 3 & 4 Will. 4. c. 98. s. 3. any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in *London*, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in *England*, any sum or sums of money on their bills or notes payable on demand, or at any time less than six months from the borrowing thereof, during the continuance of the privileges granted by this act to the Governor and Company of the Bank of *England*. In the construction of this act it has been determined, that a co-partnership, consisting of more than six persons, and carrying on the trade or business of bankers within the distance of sixty-five miles from *London*, cannot, under the acts now in force respecting the Bank of *England*, in the course of such trade or business as bankers, accept a bill of exchange at less than six months from the time of giving such acceptance. (*b*) So, where an arrangement was made between the *London* Joint Stock Bank (which was a partnership in *London* consisting of more than six persons), and the Bank of *Kingston* in *Upper Canada*, by which the latter drew bills at sixty days after sight upon the manager of the former bank, that bank agreeing to guarantee and provide for the acceptances so made by their manager in

(*a*) *Owen v. Body*, 5 Adol. & Ellis, 28.

(*b*) *Bank of England v. Anderson*, 2 Keen, 328. ; S. C. 3 Bingh. N. C. 589

his individual capacity, *Lord Langdale* held, that this transaction was a violation of the exclusive privileges of the Bank of *England* within the 3 & 4 Will. 4. c. 98., and the other acts relating to the bank, and granted an injunction accordingly. (a) This case was afterwards carried to the House of Lords, where the judgment of Lord *Langdale* was confirmed. The opinion of the Judges was taken on the occasion, which was delivered by Lord Chief Justice *Tindal*, who observed, that the rights conceded to the Bank of *England* were conceded for a valuable consideration, and the law would not permit them to be directly infringed; and it was a maxim of law, that what could not be done directly could not be done indirectly; and, therefore, the nominal acceptance of *George Pollard* (the manager) of the bills drawn by the *Canadian Bank*, the payment of which was secured by the *London Joint Stock Bank*, was an indirect infringement of the privileges of the Bank of *England*. (b) In the late case of *Ransford v. Copeland* (c), which was an action of *assumpsit* by the public officer of a company, described in the declaration as carrying on the business of bankers in *England*, according to stat. 7 Geo. 4. c. 46., the defendant pleaded that the company carrying on the business, as in the declaration mentioned, consisted of more than six persons, and that they were illegally associated together, and carried on such business for the purpose of borrowing and taking up in *England* money on their bills and notes, payable on demand, or at less than six months from the borrowing, during the continuance of the privileges granted to the Bank of *England* by the 3 & 4 Will. 4. c. 98. Replication: that the company were not illegally associated together, nor did they carry on the said business for the purposes in the plea mentioned, *modo et formá*, upon which issue was joined. It was determined, that the statement in the plea of the company being illegally associated, was a substantive allegation, compounded of law and fact, and traversable; and, therefore, that the defendant was bound to prove, not only that the company carried on business for the purpose of taking up money on bills or notes payable at less than six months, during the continuance of the Bank

(a) *Bank of England v. Booth*, 2 Keen, 466.

(b) 4 Jurist, 762. Lord *Brougham* said, that it might be considered the judgment of the Common Pleas, in *The Bank of England v. Anderson*, had been affirmed, by the above decision, by the House of Lords.

(c) 6 Adol. & Ellis, 482.

charter, but also the fact which rendered such business illegal, viz., that it was carried on within sixty-five miles of *London*.

A debt arising from notes issued in contravention of the 39 & 40 Geo. 3. c. 28., and the other acts then in force for the protection of the Bank of *England*, could not be proved under a commission of bankruptcy. Thus, where A., a partner in the *Leith* Banking Company, which consisted of more than six partners, opened an office at *Carlisle*, and circulated there promissory notes drawn by the company's cashier in *Scotland*, and made payable to the bearer on demand, at the company's office in *Leith*; it was determined, upon the bankruptcy of a debtor of A., that A.'s proof should be reduced, so far as it was founded on the notes of the company, payable to bearer on demand, which were issued to the bankrupt by A. (a)

Page 29. line 8.

So, the 57 Geo. 3. c. 99. s. 3. enacts, that "no *spiritual person* shall by himself, or by any other for himself, or to his use, engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares or merchandises, by buying and selling for hire, gain, or profit, in any market, fair, or other place, upon pain of forfeiting the value of such goods, wares, or merchandises; and every bargain and contract so made by him, or by any to his use in any such trade or dealing, contrary to this act, shall be utterly void and of none effect." In a late case, the Court of Exchequer decided, that clergymen, being members of a banking or joint-stock company, were within the prohibition of the statute, and, consequently, that an action could not be maintained by the public officer of such a company against the defendant, as the drawer and indorser of a bill of exchange. (b) To avert the consequences of this decision, the act of the 1 & 2 Vict. c. 10. was introduced, which legalises all contracts theretofore made, or to be made before the end of *the ensuing* session (1839), by associations and partnerships in which spiritual persons are engaged, provided that such associations and co-partnerships consist of more than six members or shareholders, and carry on their trade, whether as bankers, or otherwise, by means of boards of directors or managers, committees or other officers, acting on behalf of all the members or shareholders of, or per-

(a) *Ex parte* Randleson, Mont. & M<sup>r</sup>Arthur, 86.

(b) *Hall v. Franklin*, 3 Mee. & Wels. 259.

sons otherwise interested in, such associations or co-partnerships. It is observable, that the principle laid down in the case of *Hall v. Franklin*, is still applicable to all co-partnerships formed since the close of the session of 1839.

A secret or dormant partnership in the business of a pawnbroker, being in contravention of the 39 & 40 Geo. 3. c. 99., and the other acts for the regulation of that trade, has also been declared to be illegal. (a) And a partnership cannot legally subsist in a theatre not duly licensed according to statute, where the alleged contract of partnership is proved to have been formed for the unlawful purpose of representing prohibited performances at that theatre. (b)

Page 30. line 16.

It may here be observed, that the omission of the directions of an act of Parliament relating to a branch of the revenue, where the consequence is not injurious to the public at large, will not prevent the partners from enforcing a demand upon a legal contract. Thus, A. B. C. D. and E. carried on trade in partnership as distillers, and E. alone carried on the business of a retail dealer in spirits, within two miles of the distillery, contrary to the 4 Geo. 4. c. 94. ss. 132, 133., and his name was not inserted as one of the partners in the distillery in the excise book, or licence, as required by the 6 Geo. 4. c. 81. s. 7.; and it was held, that these being mere revenue regulations, the breach of them by one of the partners, with the knowledge of the others, did not render the trade carried on by the five so illegal as to deprive them of the right to recover the price of spirits sold by them, or to prevent their enforcing the fulfilment of a guarantee for the due accounting of an agent, to whom they had consigned the spirits for sale. (c) Lord *Tenterden* in this case observed, that there had been no fraud on the part of the plaintiffs on the revenue, although they had not complied with the regulations which it had been thought wise to adopt, in order to secure the conducting of the trade in such a way as was deemed most expedient for the benefit of the revenue: and after referring to the cases of *Hodgson v. Temple* (d), and *Johnson v. Hudson* (e),

(a) *Armstrong v. Armstrong*, 3 Mylne & Keen, 45.; *Armstrong v. Lewis*, 2 Crompt. & M. 274.

(b) *Ewing v. Osbaldiston*, 2 Mylne & Craig, 53.

(c) *Brown v. Duncan*, 10 B. & C. 93.

(d) 5 Taunt. 181.

(e) 11 East, 180.



his Lordship said, "These cases are very different from those where the provisions of acts of Parliament have had for their object the protection of the public, such as the acts against stock-jobbing, and the acts against usury. It is different also from the case where a sale of bricks, required by act of Parliament to be of a certain size, was held to be void because they were under that size. There the act of Parliament operated as a protection to the public as well as to the revenue, securing to them bricks of the particular dimensions. Here the clauses of the act of Parliament had not for their object to protect the public, but the revenue only. Neither is this one of that class of cases where an attempt is made to recover the price of prohibited goods. On the authority of the two cases which I have mentioned, we think the plaintiffs are entitled to retain their verdict."

## CHAPTER II.

## SECTION I.

*The Interest of Partners in Stock in Trade.*

Page 35.

THERE have been several modern cases, in which the question, whether real estate belonging to a partnership shall, on the death of a partner, be considered as realty or personalty, and accordingly go to the real or personal representatives of the deceased partner, has been discussed. In *Fereday v. Wightwick* (a), the question did not arise as to freehold lands, but as to leaseholds only. There six persons, having taken a lease of mines, and another lease of the surface of the lands under which the mines were situated, worked the mines, and occupied the surface lands as a joint and partnership concern. The *Master of the Rolls*, alluding to *Crawshay v. Maule* (b), says, "Lord Eldon expressed a doubt whether, if persons previously entitled, as tenants in common, to mines, were to form a mining concern, the general principles of a partnership would apply to such a case; and I am not aware that the particular point has ever been decided. But the distinction here is, that the interest in the mines was expressly acquired for the purpose of a partnership; and the general principle is, therefore, to be applied to it."

In *Phillips v. Phillips* (c), the testator carried on the business of a brewer in partnership with another person (no articles of partnership having been entered into or drawn up between them), and in the course of their business he and his co-partners purchased, with partnership monies, certain freehold and copyhold public-houses, for the purposes of their trade, which were conveyed and surrendered to the two partners and their heirs; and one question in the cause was, whether the interest of the testator in these public-houses was to be

(a) 1 Russ. &amp; Mylne, 45.

(b) 1 Swanst. 495.

(c) 1 Mylne &amp; Keen, 649.

considered as a part of his general personal estate, or only personal estate so far as it was required for the discharge of the debts and engagements of the trade. For the plaintiffs, the co-heiresses, it was contended that although the real estate purchased with the partnership property was converted into personalty for the purposes of the partnership, yet, when those purposes were served, the property resulted in its original character of real estate to the heir; on the other side it was contended, that since the cases of *Thornton v. Dixon* (a), and *Bell v. Phyn* (b), the law, as to the effect of purchases of real estate made with partnership property, had been entirely altered; and that it might now be considered as settled, that the equitable interest in real property, purchased with partnership capital for partnership purposes, was, upon the decease of a partner, distributable as such partner's personal estate. The *Master of the Rolls*, in giving judgment, observed, "I confess I have, for some years, notwithstanding older authorities, considered it to be settled, that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have, to every intent, the quality of personal estate: and in the case of *Fereday v. Wightwick* (c), I had no intention to confine the principle to the payment of the partnership demands. Lord *Eldon* has certainly, upon several occasions, expressed such an opinion: the case of *Townsend v. Devaynes* is a clear decision to that effect; and general convenience requires that this principle should be adhered to."

Another case in which this question arose was *Broom v. Broom*. (d) In that case, it appeared that certain real estates had been purchased by *John Broom*, the younger, and *Herbert Broom*, deceased, who had carried on business in co-partnership together, out of partnership capital and for partnership purposes. *Herbert Broom* died intestate, leaving his widow and two infant children surviving him; and his widow took out administration to his estate, and afterwards sold her interest in the estates so purchased to *John Broom*, the surviving partner. The purchase-money was not paid, and *John Broom*, having afterwards become bankrupt, certain portions of the estates were purchased at a sale, under an order in bankruptcy, by the defendants, the assignees.

(a) 3 Bro. C. C. 199.

(b) 7 Ves. 455.

(c) 1 Russ. &amp; Myl. 45.

(d) 3 Mylne &amp; Keen, 443.

The object of the bill, which was filed by the widow and administratrix of the deceased partner against the infant heir and the assignees of the bankrupt, was to have that sale confirmed, and, for that purpose, to have it declared that the share of *Herbert Broom* in the estates in question, became, on his decease, personal assets to be administered by his administratrix. *Sir John Leach* considered the question settled by the decision in *Phillips v. Phillips* (a), and held that the infant heir was a trustee for the administratrix of the deceased partner. The next case is *Morris v. Kearsley* (b), where one of two partners in a brewery died intestate, and the surviving partner agreed to purchase his co-partner's moiety in the business; and as the partnership property consisted, in a great measure, of freehold estate, the suit was instituted for the purpose of determining, as between the real and personal representatives of the deceased partner, whether the real estates in the partnership were to be considered as realty or personalty. In the course of the argument, the cases of *Phillips v. Phillips*, and *Broom v. Broom* were cited, and *Mr. Baron Alderson*, upon the authority of those cases, decreed in favour of the personal representative.

In *Randall v. Randall* (c), A. and B., who were tenants in common of an estate, agreed to carry on the farming business in co-partnership, and afterwards entered into co-partnership as maltsters and biscuit-bakers. From time to time they made purchases of land with the partnership monies. Some of the lands so purchased were not conveyed to them, but others were conveyed, as to one moiety, to A., who was a bachelor, in fee, and, as to the other moiety, to B., who was married, and a trustee, to bar dower. The lands were used solely for farming and agricultural purposes; but all the receipts and payments in respect of them were entered in the partnership books, and carried to the account of the partnership. The farming business was continued until A.'s death; but the malting and biscuit-baking had ceased several years before. It was determined by the *Vice-Chancellor* that, under these circumstances, the lands were not converted into personalty; but, on arriving at that conclusion, he was influenced chiefly by the consideration, that it did not appear the parties purchased any part of the land for the purposes of their partnership in trade. "Having," said his Honor, "in the first instance, agreed to carry on the farming business in partnership, they

(a) 1 Mylne &amp; Keen, 649.

(b) 2 You. &amp; Col. 139.

(c) 7 Sim. 271.



subsequently agreed to become co-partners, first as maltsters, and afterwards as biscuit-bakers. The first purchase that they made was of an undivided fourth part of an estate, of which they previously had a moiety as tenants in common. It would, however, be strong to say, that because these parties, being partners in the farming business, which is not a trade, happen, collaterally to that business, to carry on a trade; therefore, the nature of the property which they so purchased is to be changed." And again he says: "The next estate was purchased of *Miss Long*; but it was never used for any of the purposes of the partnership trade: and as the judges, who decided the cases to which I have alluded, have expressed their opinions to be, that land cannot become personal estate unless it is purchased for the purposes of the partnership trade, the land purchased of *Miss Long*, although it may have been paid for out of the partnership capital, cannot be considered as partaking of the nature of personal estate." "The fair inference to be drawn from the facts of this case, is that the trade was collateral to and arose out of the principal business of farming: and there is no reason to conclude, from any of the decided cases, that any of the property to which this suit relates ought to be considered as personal estate."

In *Cookson v. Cookson* (a), it appeared that *Isaac Cookson*, having for some years carried on trade upon land, of which he was seised in fee, took one of his younger sons into partnership with him for the term of twenty-four years, and conveyed to him in fee certain shares of the land; and by their articles of co-partnership they covenanted that the land "should," at all times thereafter, be held and accepted as partnership property, and be considered and treated as part of the joint stock of the partnership trade, according to the several shares and interests of the partners therein: and it was provided, that if either partner died or retired during the twenty-four years, his co-partner might purchase his share, at the sum stated to be its value in the last yearly accounts. Some years after the partnership was formed, but during its continuance under the articles, *Isaac Cookson* conveyed to his son in fee three additional shares in the land; and by an indenture afterwards executed, reciting that it was the intention of the parties that the three additional shares should be vested in the son, his heirs and assigns, and that the rest of the father's shares should remain vested in him, his heirs and

(a) 8 Sim. 529.

assigns, to be had, taken, and enjoyed, as part of the joint stock in the partnership trade or business, it was declared that the additional shares should be held subject to the stipulations in the articles of partnership. The father and son carried on the business in partnership, under these articles, and with this variation in their shares, during the term of twenty-four years; and after the expiration of the term, and until the father's death, they continued to carry it on together in the same manner as they had done during the term, without entering into any new agreement, and from the commencement of the partnership they held and used the freehold premises for the purposes of their trade alone; and the estimated value of those premises was entered in the books and accounts of the partnership, as part of the capital or joint stock, and was treated and considered in all respects as part thereof. The father died intestate; all debts due from the trade at his death were paid; and the son remained in possession of the stock, including the land, and continued to carry on the trade on his own account. A bill being filed by the five youngest children of the intestate against their brothers, one of whom was the eldest son and heir at law, and the other the late partner of the intestate, praying, that it might be declared that the former had no beneficial interest in the freehold premises as heir; and that the whole of the trading concern might be sold, and the proceeds divided between the intestate's estate and the defendant his late partner, according to their respective shares therein; and that it might also be declared that the defendant, the late partner, had no right of pre-emption as to his father's shares, it was contended, that, by the effect of the clause in the articles, the land was converted absolutely into personalty. But the *Vice-Chancellor* (who, in the course of the argument, had asked whether "there was any case in which it had been decided that real estate, in its original nature, had changed its quality, where it was neither purchased out of the partnership funds, nor was required to be sold for partnership purposes, after the termination of the partnership?") said, that he understood that clause as having a very distinct meaning, namely, that, during the partnership, and, if necessary, for partnership purposes after the expiration of the partnership, the shares which the father and the son had respectively should be considered as personal estate; but it would be quite absurd to say, that that covenant should be so extended, as that, though the partnership

expired, and though the land was not required to be sold for partnership purposes, it should have the effect of making that which was unquestionably land in its own nature, absolutely personal estate, not for any beneficial purpose to the father or to the son, but for the purpose of making a sort of unnatural and unnecessary conversion of real assets into personal, as between the real and personal representatives of the two partners respectively. "In the first place," observes his Honor, "there was no purchase of the land out of partnership assets for partnership purposes; and there are no stipulations in the articles of partnership, which, upon a fair construction, can be said to have the effect, as between the real and personal representatives of *Isaac Cookson*, of converting the real estate into personalty; and it was not necessary for any partnership purpose that there should be any conversion. Therefore my opinion is, that the original character of the shares remaining in *Isaac Cookson* continued after his death, and consequently that his heir at law is entitled to them." His Honor seemed to consider that the doctrine of *Sir Wm. Grant*, in *Bell v. Phyn (a)*, governed the case, as it was not suggested there was any necessity for a sale of a particle of the joint assets for the purpose of paying the partnership debts. This last decision, therefore, leaves the question still unsettled.

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## SECTION II.

### *Of Acts by which one Partner may bind the Firm.*

Page 38. line 24.

ON the same principle of want of necessity, an authority will not be implied on the part of the directors of a mining company to draw or accept bills, so as to bind the shareholders; and therefore, in an action against a shareholder on such a bill, it is incumbent on the holder to show affirmatively an express power in those who have the management of the concern to pledge the credit and responsibility of the shareholders in that manner. The effect of a contrary doctrine would be, that each of the partners in the concern would have the power of pledging the

(a) 7 Ves. 453.

others, not only to the extent of the goods the company might sell in the course of their ordinary dealings, but without any limit at all, inasmuch as one partner might raise money to any amount by drawing bills of exchange, and, if they were passed into the hands of innocent indorsees, the partners would be liable to the full extent of their fortunes. Therefore, in an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an indorsee for value, sought to charge the defendant as a member of that company, it was proved that the bill had been drawn and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 15*l.* per share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders: it was held, that assuming this to be sufficient evidence of the defendant's being a partner in the company (which some of the judges seemed to think it was not), it was incumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff not having produced the deed of co-partnership, nor given any evidence to show that it was necessary for the purpose of carrying on the business of that mining company, or usual for other mining companies to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in that form, which in effect were promissory notes. (a) And in a more recent case, which was an action by the indorsee of a bill drawn by a director of the *South Metropolitan Gas Light and Coke Company* upon A., B., C., and other directors of the company, and which bill was accepted "For Self and Directors, D. Chairman," it was held, that the indorsee of the bill could not recover against the company generally, although the verdict he had obtained against the drawer and acceptor was not disturbed: and *Tindal C. J.*, in the course of his judgment, said, that the right of one director to accept a

(a) *Dickinson v. Valpy*, 10 B. & C. 128.



bill for himself and the others, so as to make the others liable, was not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade, but that it must depend upon the powers given by the charter, or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn and accepted shall or shall not have that legal effect. (a) It follows, from these determinations, that the agent of a joint stock or mining company has no implied authority to bind the company by bills of exchange. (b)

Page 44. line 20.

Where S., being indebted to a firm in which he was a partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt, the payees indorsed it over, and the indorsee sued the parties, who appeared to be the makers, it was determined that this note was made in fraud of S.'s partner in the second firm, and could not be enforced against him by the payees; and that, at least under these circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration; and it was also held, contrary to the opinion of Mr. Justice *Parke*, that in all cases, where, from defect of consideration, the original payees cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he may have had no notice that such proof will be called for. (c)

Page 48. line 12.

In a late case it appeared, that, on the 24th *June*, 1824, C. agreed to become a partner with A. and B., the business to be carried on in the names of A. and B. for the benefit of A., B., and C., and that the partnership should be considered as commencing on the 18th of *May* preceding. Before the 24th of *June*, A. and B. had opened an account with certain bankers, which was continued in their names till the 22d of *September*,

(a) *Bramah v. Roberts*, 3 Bingham N. C. 963.

(b) *Ducarry v. Gill*, 1 Mood. & Malk. 450.

(c) *Heath v. Sansom*, 2 B. & Adol. 291.

when the partnership as to B. was dissolved. All the business with the bankers was transacted by B., and the bankers did not know that C. was a partner till the account was closed. B. used the accounts for the purposes of the firm of which C. was a member, as well as for others. On the 21st of *May* he indorsed a bill of exchange in the partnership names of A. and B. to the bankers, who discounted it, and placed it to the credit of the account. On the 13th of *July* he indorsed two others in a similar manner; and it was held, that as the bankers did not know that the money raised by these bills was intended to be applied to other than partnership purposes, C. was liable on the last two bills, but not on the first, he not having been an actual partner at the time when it was discounted. (a) In this case, *Bayley J.*, after stating the general rule to be, that where the partnership name is pledged, any person who is either an actual partner, or has allowed himself to be held out to others as a partner, is liable, unless the party to whom the partnership credit is pledged is privy to an intent to misapply the money, observed, that, if that be true of actual partners, the only question was, who were partners at the time the partnership name was pledged? So, where it appeared that A., B., and C. carried on business as partners, under the firm of A. and Co., for about four years previous to *May*, 1824, when C. retired, and the other two partners agreed to liquidate all the debts due from the partnership; and they continued the business as partners under the firm of A. and B. In *June*, 1824, D. agreed to become a member of this last-mentioned partnership, as from the 18th of *May* preceding, but his name was not to be introduced, and the business was still carried on under the names of A. and B. only. In *July* 1824, E. being indebted to F., drew a bill of exchange in his favour upon A. and Co., which bill was accepted by the partner B. in the names of A. and B. E., the drawer of the bill, had had dealings with the firm of A. and Co.; but whether that firm was indebted to him when the bill was drawn did not appear, nor did it appear that there had been any dealings between E. the drawer and A. and B. after the entrance of D. into the partnership. The name of D. was never used or made known to any person dealing with the firm. Upon these facts, it was held by the Court of King's Bench, that A., B., and D.

(a) *Vere v. Ashby*, 10 B. & C. 288.

were liable upon this bill as acceptors. (a) In like manner, where A. and B. carried on business together in partnership, B. being a secret partner; A. also carried on a different business on his own separate account. In the course of his transactions in his individual business, A. incurred a debt with the plaintiffs, for which two bills of exchange were given: one of them was dishonoured; and on the other becoming due, the two were exchanged with A. for one to a much larger amount, accepted in the name of the firm of A. and B. The plaintiffs had likewise in their possession another bill accepted in the name of the partnership firm. When these bills were taken, the plaintiffs knew nothing of B., and they made no inquiry after him, until some time after the bills became due; considering A. to be the only person bound by them; and in an action against A. and B. on these bills, the Court of Exchequer held that they were both liable as acceptors. (b)

Page 53. line 12.

In *Ex parte Copeland* (c), where the pledgee had notice, before the pledge, of the joint interest in the goods, *Erskine*, C. J. of the Court of Review, thought the case not governed by the decision in *Reid v. Hollinshead* (d), doubting the power of one partner in such a transaction to bind the joint property, it being out of the ordinary course of trade. And Mr. Justice *Rose* thought that, under the circumstances, it would have been difficult for the pledger to have bound the whole interest of the partners, though he might have incumbered his own interest. The case, however, was disposed of on another point.

Page 67. line 14.

In the case of *Boyd v. Emmerson* (e), one question was, whether a partner could bind his copartners by a parol submission to arbitration? but the case being disposed of on other points, it became unnecessary to decide that question. However, Sir *F. Pollock*, who had to maintain the affirmative, in the course of his argument observed, that the point might be considered

(a) *Lloyd v. Ashby*, 2 B. & Adol. 23.

(b) *Wintle v. Crowther*, 1 Crompt. & Jerv. 316.

(c) 2 Mont. & Ayr. 177.

(d) 4 B. & C. 867. ; S. C. 6 D. & R. 444.

(e) 2 Adol. & Ellis, 184.

## 18 *Acts by which a Partner may bind the Firm.* [SUPPL.

as *res integra*, and admitted that “one partner cannot bind another in a matter of arbitration, where the submission is by deed: because, in general, he cannot bind his partner by any deed. (a) But it does not follow that one of several persons who are general partners cannot in any way bind the rest by a submission to arbitration, upon a specific matter of partnership right. One partner may bring, or settle an action on behalf of the rest (b); why may he not enter into an agreement to refer the subject matter? And if so, why may not one agree, on behalf of the rest, to be governed by an opinion in which both they and the opposite party may confide? In *Strangford v. Green* (c), the submission appears to have been by arbitration bond, and therefore the partner could not be bound. In *Stead v. Salt* (d), the parties were not partners generally, but only in the dealings to which the award related: the matter was twice referred: in the first instance, four partners signed the agreement of reference; the arbitration went off, and the new agreement was signed by three only. In the absence of any explanation, it was reasonable to suppose, that if both agreements were signed by the authority of all the partners, the second would have been executed by the same number as the first. The passage cited in that case from *Com. Dig.* (e), from which it was implied that a partner cannot bind his copartner, probably refers to submissions by deed. There is no ground in reason for saying that, in the case of a general partnership in a banking firm, one partner cannot submit, on behalf of all, to such a mode of settling a dispute upon a partnership concern as was adopted here. Suppose the question had been a practical one, as to something to be done in the course of business, might not a partner have agreed to take the judgment of an experienced person, as a Custom-house officer, a dock-master, or an eminent merchant? And if so, why not the opinion of counsel in the present case? To hold that the opinion could not be so taken, would throw great impediments in the way of a very common, useful, and economical mode of settling such disputes.”

(a) *Harrison v. Jackson*, 7 T. R. 207.

(b) *Furnival v. Weston*, 7 B. Moore, 356.; *Harwood and others v. Edwards*, Gow on Partn. 65. note (g), 3d edit.

(c) 2 Mod. 228.

(d) 3 Bingham, 101.

(e) *Arbitrament* (D. 2.).



## SECTION III.

*Legal Remedies between Partners.*

Page 75. line 6.

It should seem from a late case, that an express promise, after an account stated, which was meant to be a final account, is not necessary. There, the plaintiff and the defendant having been partners in the purchase and sale of wool, and having been engaged in other dealings, stated an account, in which the amount due on the wool account was included. The amount showed a balance of 15*l.* in the plaintiff's favour, and opposite that sum the defendant wrote "Due from me to Mr. Wray," and signed his name. The plaintiff having recovered the amount of the item for wool, it was contended, on a motion for a new trial, that there was not a sufficient promise to support the action; but the Court determined otherwise. Lord *Abinger* said, "I think there is no ground for the motion, and that there is quite sufficient evidence of this being a final account. This was not the case of a general continuous partnership, but only in a particular adventure; and it was quite natural that the parties should take a settlement on the conclusion of each adventure, as ship-owners settle on the conclusion of each voyage. Then the account being settled, there is an unqualified acknowledgment, signed by the defendant, that 15*l.* is due from him to the plaintiff on the general balance of accounts between them. If the item forms part of a settled account, with a promise to pay the balance, I think there is no need of an express promise to pay the particular item." *Parke B.* said, "If there be any case which lays it down that an express promise is necessary after an account stated, which was meant to be a final account, I dissent from that doctrine. Here the partnership item is introduced as an item in the general account, and the defendant acknowledges the balance, and thereby becomes liable to pay; there is no occasion afterwards to go through the form of words that he promises; the transaction speaks for itself." *Maule B.* said, "I know of no rule of law which requires, in this or in any other case, an express promise. The law requires a promise;

which may be collected, sometimes from an expression in words, sometimes from other matters. Sometimes an account is so stated, as in itself to import no promise; then a subsequent promise in words supplies the legal promise stated in the declaration. Here it is clear that the statement of the account itself imported a promise to pay the items included in it." (a)

Page 79. line 11.

And in a recent case it was held, that one of several partners in trade, who pays money on account of his copartners, cannot maintain an action against them for contribution on the ground that he made such payment not voluntarily, but by compulsion of law. (b) When this case was before Lord *Denman* at *Nisi Prius*, it was contended, that the plaintiff, one of the three joint contractors, having been alone taken in execution on a judgment against all, and *compelled* to pay money which his co-contractors were jointly liable to pay, was entitled to maintain this action. On the other hand, it was said that the plaintiff and the defendants in the first action being not merely co-contractors, but copartners in trade, *one* of them could not maintain an action against the other to recover money paid on account of the firm, but that his remedy was by bill in equity: the reason why an action at law in such a case was not maintainable, being, that it would be useless for one partner to recover what, upon taking a general account among all the partners, he might be liable to refund, and this objection applying as well to a compulsory as to a voluntary payment. Lord *Denman* was of that opinion, and nonsuited the plaintiff; and his Lordship's opinion was afterwards confirmed by the Court. In *Helme v. Smith* (c), a part-owner of a ship, who, as ship's husband, had incurred the expense of outfit, sued another part-owner for his share of the expense; it was answered that no action lay, inasmuch as the plaintiff and defendant appeared to be partners; and *Tindal* C. J. there said, "If, indeed, the plaintiff and defendant were partners, there is an end of the question; but part-owners of a ship are not *necessarily* partners."

Page 92. last line.

In respect to actions between the members of joint stock companies in general, the rules applicable to ordinary partnership

(a) *Wray v. Milestone*, 5 Mee. & Wels. 21.

(b) *Sadler v. Nixon*, 5 B. & Adol. 936.

(c) 7 Bingh. 709.

apply; but an exception was introduced by the legislature in favour of banking companies. The 7 Geo. 4. c. 46. s. 9. enacts, “that all actions and suits, and also all petitions to found any commission of bankruptcy, against any person or persons, who may be at any time indebted to any such copartnership carrying on business under the provisions of this act, and all proceedings, at law or in equity, under any commission of bankruptcy, and all other proceedings, at law or in equity, to be commenced or instituted for or on behalf of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any other matter relating to the concerns of such copartnership, shall and lawfully may, from and after the passing of this act, be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid, for the time being of such copartnership, as the nominal plaintiff or petitioner for and on behalf of such copartnership; and that all actions or suits, and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, against such copartnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers, nominated as aforesaid, for the time being of such copartnership, as the nominal defendant for and on behalf of such copartnership.” Under this act of parliament, it was conceived, that though the company might, by means of their public officer, sue a stranger, and a stranger might, through their public officer, sue the company, yet that the construction which the courts of law had put on it was such, that it did not enable a partner of the company to sue the company, or the company to sue a partner. To remedy this supposed evil, it was, on the 14th August 1838, enacted by the 1 & 2 Vic. c. 96. (which recites the preceding clause in the 7 Geo. 4. c. 46., and also the *Irish* statute of the 6 Geo. 4. c. 42.), “that any person now being or having been, or who may hereafter be or have been, a member of any copartnership now carrying on or which may hereafter carry on the business of banking under the provisions of the said recited acts, may, at any time during the continuance of this act, in respect of any

demand which such person may have, either solely or jointly with any other person, against the said copartnership, or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit, or other proceeding at law or in equity against any public officer appointed or to be appointed under the provisions of the said acts, to sue and be sued on the behalf of the said copartnership; and that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding at law or in equity against any person being or having been a member of the said copartnership, either alone or jointly with any other person, against whom any such copartnership has or may have any demand whatsoever; and that every person being or having been a member of any such copartnership shall, either solely or jointly with any other person (as the case may require), be capable of proceeding against any such copartnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said copartnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences, as if such person had not been a member of the said copartnership; and that no action or suit shall in anywise be affected or defeated by reason of the plaintiffs or defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said copartnership; and that all such actions, suits, and proceedings shall be conducted and have effect as if the same had been between strangers." The fourth section enacts, "that no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits, or bonus payable or apportionable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which such copartnership may have against such member, on account of any other matter or thing whatsoever; but all proceedings, in respect of such other matter or thing, may be carried on as if no claim or demand existed in respect of such capital or joint stock, or of any dividends, interest, profits, or bonus payable or apportionable in respect thereof." The fifth section enacts, "that this act shall continue in force until the end of the next session of parliament." The



2 & 3 of Vic. c. 68. continued the act of the 1 & 2 Vic. c. 96. to the 31st August 1840 ; but no other act, in continuation of it, has been passed by the legislature, so that its provisions are not now in force, and the law is the same as it existed under the 7 Geo. 4. c. 46. In *Ex parte Hall* (a), the Court of Review, on the construction of the two acts of the 7 Geo. 4. c. 46., and the 1 & 2 Vic. c. 96., held, that a fiat in bankruptcy, sued out by the registered officer of a banking company against one of their shareholders for a debt due to them from him for calls, and also on his banking account, was sustainable.

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#### SECTION IV.

##### *Equitable Remedies between Partners.*

###### Page 94. line 4.

IN a modern case, which was a bill to establish a partnership between the plaintiff and the defendant in the *Surrey Theatre*, it appearing that the contract of partnership was formed for the unlawful purpose of representing prohibited performances at that theatre, it was decided by Lord *Cottenham*, in affirmance of the opinion of the *Vice Chancellor*, who had dismissed the bill with costs, that it was impossible the plaintiff could be entitled to any decree which should be founded upon or grow out of that contract ; and he accordingly dismissed the appeal. (b) So, in *Armstrong v. Armstrong* (c), it was held, that an agreement for a secret partnership was a contravention of the laws made for regulating the business of a pawnbroker (see the 39 & 40 Geo. 3. c. 99.), and no legal partnership being thereby constituted, the secret partner had no claim for an account in equity.

###### Page 95. line 22.

The question, whether a bill to have the accounts of a partnership taken can be maintained without praying a dissolution,

(a) 1 Mont. & Chit. 365.

(b) *Ewing v. Osbaldiston*, 2 Mylne & Craig, 53.

(c) 3 Mylne & Keen, 45

came directly before the Court in the late case of *Loscombe v. Russell* (a), in which it appeared that the plaintiffs and the defendants were copartners, as carriers on the Western Road, under articles of copartnership, for seven years from the 1st of July 1822, "and so from seven years to seven years, till determined by notice." The first period of seven years having expired and no notice of dissolution having been given, the partnership was continued for another period of seven years, of which one year had elapsed at the time the bill was filed. It prayed an account of the dealings and transactions of the partnership, but did not seek a dissolution. The defendant put in a general demurrer. After argument, the Vice Chancellor (Sir *Lancelot Shadwell*) said, "I take this to be a bill which purposely avoids the prayer for a dissolution; and that it was not in the contemplation of the plaintiff that the partnership should be put an end to. It would, therefore, be a surprise upon the parties to this record, if I were to deal with it as if a dissolution were sought. Heré the partnership is still subsisting; and the bill is filed for an account merely of the dealings and transactions of the partnership. With respect to the law of this Court upon this subject, there is no instance of an account being decreed of the profits of a partnership, on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. The opinion of Lord *Eldon* upon this subject has been, from time to time, expressed both before and since the decision of *Harrison v. Armitage*. (b) Suppose that the Court would entertain a bill like the present, and direct an account to be taken of the dealings of a partnership, and that it appeared, by the *Master's* report, that a balance was due from the defendant to the plaintiff, then, upon further directions, the plaintiff would ask for an order that the balance might be paid to him; it would, however, be competent to the defendant to file a supplemental bill, in order to show that, since the account was taken, a balance had become due to him from the plaintiff, after giving the plaintiff credit for the amount found due to him by the *Master*; and thus the matter might be pursued with endless charges, and supplemental bills might be filed every year that the partnership continued, and a balance would never be ascertained till the partnership expired, or the Court put an end to it. This Court will not always interfere to enforce the

(a) 4 Sim. 8.

(b) 4 Madd. 143.

contracts of parties, but will, in some instances, leave them to their remedy at law ; as in the cases of agreements for the purchase of stock or for the building of houses. With respect to occasional breaches of agreements between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the Court stands neuter ; but, when it finds that the acts complained of are of such a character as to show that the parties cannot continue partners, and that relief cannot be given but by a dissolution, the Court will decree it, although it is not specifically asked. Here a dissolution is not prayed for ; and, if the Court were to do what is asked, it would not be final. Having regard, then, to the opinion expressed by Lord *Eldon*, both before and after the decision in *Harrison v. Armitage*, my settled opinion is, that this bill cannot be maintained ; and, therefore, the demurrer must be allowed." In the recent case of *Knebell v. White (a)*, Mr. Baron *Alderson* concurred in and acted upon this opinion of the *Vice Chancellor*. And in *Bentley v. Bates (b)*, Lord *Abinger*, although he admitted the necessity of praying for a dissolution, where an account is asked in the case of a mercantile partnership, yet held that the rule did not apply to mining partners.

Page 96. note (c).

So, where a bill was filed by a person who claimed a certain definite interest in a mine and mining adventure, as one of a number of copartners, stating that the defendants, who were the legal owners of the mine, and also copartners in the adventure, had subsequently, unknown to the plaintiff, but with the consent of the other copartners, and after fully accounting to such copartners for their shares of the profits up to that time, sold and conveyed the mine to trustees for a joint stock company, the property of which was held by a numerous body of proprietors in transferable shares passing by delivery of the certificates, and had received the consideration for the sale, partly in money, and partly in shares in the joint stock company, and praying that the defendants might, at the plaintiff's election, either account to the plaintiff for his proportion of the profits derived from the sale, or out of the shares of the joint stock company in their hands, might transfer to him such a number of shares as would be equivalent to the interest which

(a) 3 You. & Col. 15.

(b) 4 Jurist, 552.

the plaintiff had in the original adventure, it was determined by Lord *Cottenham*, that a demurrer would not lie to such a bill on the ground that the other copartners in the original adventure, or the trustees or shareholders of the joint stock company, were not made parties. (a)

Page 96. line 24.

In *Lloyd v. Loaring* (b), the Court intimated that persons, jointly interested, might properly sue on behalf of themselves and others, provided it was manifestly inconvenient to justice to make all of them parties. So, where a bill was filed by several of the proprietors of the *Philanthropic Annuity Institution* against the solicitor of the Institution, who was charged with a breach of trust, Lord *Eldon* decided that, in the case of a very numerous association in a joint concern, the general rule might be dispensed with; but he expressly annexed to the relaxation of the rule the condition, that the case should be one where the rule was incapable of application, and where a failure of justice would be occasioned by an adherence to it. (c) In *Gray v. Chaplin* (d), it was held, that two shareholders of a canal company were entitled to file a bill, on behalf of themselves and all the other shareholders, to set aside an agreement entered into by the commissioners of the canal; and the ground of the decision was, that the agreement contravened the provisions of the act of parliament under which the canal was made, and that the suit must, therefore, be intended to be beneficial to every shareholder. But the general rule was acted upon in a more recent case (e), where the plaintiffs sued on behalf of themselves and other persons, who were subscribers together for a certain proportion of shares in the *British Mining Association*, such other persons having executed a deed by which they assigned, upon certain conditions, their interest in the concern to the plaintiffs, and constituted the plaintiffs their attorneys for the purpose of prosecuting their claims and interest in any action or suit. The bill was filed against the directors for the purpose of recovering the deposits paid by the plaintiffs and the

(a) *Mare v. Malachy*, 1 Mylne & Craig, 559.

(b) 6 Ves. 773.

(c) *Cockburn v. Thompson*, 16 Vesey, 321. And see *Hichens v. Congreve*, 4 Russ. 562.; *Taylor v. Salmon*, 4 Mylne & Craig, 134.

(d) 2 Sim. & Stu. 267.

(e) *Blain v. Agar*, 1 Sim. 37. See also *Van Sandau v. Moore*, 1 Russ. 441.



other shareholders on the ground of fraud. A demurrer was taken *ore tenus*, that the persons who had assigned their interests, upon condition, to the plaintiffs ought to have been made parties to the suit; and the demurrer was allowed, Sir *John Leach* observing that, though it might be true that those persons were very numerous, and that naming them as parties on the record would render it impossible for the plaintiffs to obtain a decree in the case, he should be making a new practice if he yielded to arguments founded upon the inconvenience in the particular case, of adhering to the general principles of the Court. The principle laid down by the decisions was followed in *Long v. Yonge (a)*, where the bill was filed by some of the members of the *Norwich Equitable Insurance Company* on behalf of themselves and the rest of the members, and prayed that the concerns of the company might be wound up, and that the surplus effects might be divided among the members. Sir *Lancelot Shadwell* refused to entertain the bill, and in the course of his judgment observed, "The general rule is, that all parties interested in the subject of the suit shall be parties to the record. Then there are certain exceptions, and those exceptions, as far as this particular point is concerned, may be divided into two parts. One exception is, where several persons, having distinct rights against a common fund, or against one individual, are allowed, a few of them on behalf of themselves and the rest, to file a bill for the purpose of prosecuting their mutual rights against the common fund, or the individual liable to their demand. The other exception is, where a person may have a right against several individuals who are liable to common obligations. In that case a bill is allowed to be filed by a single plaintiff against some, but not all, of those persons who are bound to make good the plaintiff's demand. This is the general division of the exceptions to the general rule. Then we have to consider whether this case falls within either of those exceptions. If, in this case, the bill had been filed by some of the members of the society against an individual upon whom the whole society had a demand, it is perfectly clear that he could not have made an objection that all the members were not parties; and the rule laid down by Lord *Eldon*, in the cases of *Cockburn v. Thompson (b)*, and *Adair v. The New River Company (c)*,

(a) 2 Sim. 369.

(b) 16 Ves. 321.

(c) 11 Ves. 429.

would have obviously applied. But the very nature and object of this suit is to deprive persons, who are not parties on the record, of that right, which, upon the face of the bill, they at present possess; and it appears to me that this case is as distinct from the two that I have mentioned, as a case can be, and that it is precisely governed by the principle upon which Lord *Eldon* allowed the demurrer to the first bill filed by Mr. *Van Sandau*. The plaintiffs, therefore, ought not to be at liberty to stir in the case, until they have made every one of those individuals parties. That is my clear opinion, and I have no doubt whatever about it." In the late case of *Small v. Atwood* (a), Lord *Lyndhurst* recognised the principle established by the authorities, that, where a few partners are permitted to sue on behalf of themselves and the other partners, there must be a community of interest between the parties suing and those who are absent, and the object of the suit must be manifestly for the advantage of the absent members. And in the more recent case of *Evans v. Stokes* (b), Lord *Langdale* acted upon that principle. There the bill was filed by three persons on the part of themselves and all other members or partners of the *French Brandy Distillery Company*, except the defendants, against the defendants, who, with the exception of two, were the directors of the company. The objects of the suit were to have the affairs of the partnership wound up, and settled under the decree of the Court, to have the accounts of the partnership taken, and to set aside a sale of part of the partnership property made by the directors to the defendant *Betts*. And Lord *Langdale* said, "It is perfectly obvious that a suit, where all the accounts of the partnership are to be taken, and the rights of all the partners are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those partners. The cases, in which suits have been permitted to be instituted by a few persons on behalf of themselves and a numerous body of other persons, have been cases in which there was plainly a community of interest between the plaintiffs and those whom they represented; but this is a case in which it is not disputed that there is a great diversity of interests as between different

(a) 1 Younge, 407.

(b) 1 Keen, 24.

classes of the members of this partnership, and yet the Court is called upon to wind up the whole transactions of the partnership in the absence of a great number of the partners. The frame of the suit is plainly defective." And the general principle, that in a suit of which the object is to adjust and wind up the concerns of a company or a partnership, and to obtain a decree by which the rights of all the partners are to be bound, all the partners, however numerous, must be before the court, has been recognised and approved of by Lord *Cottenham*. (a) It has been decided, that where some of the shareholders of a joint stock company are ignorant of the names of the other shareholders, a bill filed by them, seeking a return of their deposits, and containing an allegation of ignorance as an excuse for not joining those others in the suit, is maintainable. (b) An act of parliament for forming a joint stock company authorised all suits on behalf of the company against any person, to be commenced in the name of the chairman, and in all proceedings in which it would have been before necessary to state the names of the partners, it was made sufficient to state the name of the chairman only; and it was determined, that the act did not authorise suits to be commenced by the chairman against one of the partners without making the others parties. (c)

There are some societies not engaged in trade, which are dealt with in a Court of Equity as partnerships; as private societies for the relief of the members in case of sickness, &c. To such societies the ordinary rule applies. Therefore, where some of the members of the *Benevolent Union Society*, on behalf of themselves and the other members, filed a bill against the six defendants, who were the trustees, praying an account and injunction, and that the defendants might be decreed to replace part of the stock of the society which they had sold out, and it appeared that the number of members was limited to sixty-one, that the society had been dissolved, and that forty-seven members, who were not parties, had received their share of the trust funds, Lord *Eldon* refused to interfere until they were brought before the court. (d)

(a) *Mocatta v. Ingilby*, cited 1 Keen, 30. And see *Walburn v. Ingilby*, 1 Mylne & Keen, 61.

(b) *Blain v. Agar*, 2 Sim. 289. And see *Fenn v. Craig*, 2 You. & Coll. 216.

(c) *Macmahon v. Upton*, 2 Sim. 473.

(d) *Beaumont v. Meredith*, 3 Ves. & Bea. 180. And see *Pearce v. Piper*, 17 Ves. 1.



## Page 103. line 3.

In a late case, it appeared, that, in the year 1800, A., B., and C. entered into partnership as attorneys, upon certain terms expressed in a memorandum. In 1808, A. died, leaving B. his executor and residuary legatee, and then B. and C. formed a partnership, and agreed to share the profits equally. In *December* 1825, their partnership was dissolved by consent. During the former partnership A. and B. had made advances, both jointly and severally, for C.'s private use; and during the latter partnership B. made similar advances. In 1827, B. became bankrupt. No settlement of accounts having taken place between any of the parties, in *July* 1831, B.'s assignees filed a bill against B. and C., for an account of the dealings of both partnerships, and of all the advances made by A. and B. C. pleaded the Statutes of Limitations (21 Jac. 1. and 9 Geo. 4.) to so much of the bill as related to such advances; and it was held that, as the plea extended to the joint advances of A. and B. during the first partnership, it covered too much, and was, therefore, bad. (a)

## Page 105. line 17.

Where by articles of partnership it was agreed that just and true accounts should be made out, half-yearly, and signed by the partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners; and it appeared that the accounts were made out by one of the partners; and, after the death of two of the other partners, it was discovered that the accounts were fraudulent; it was held by the *Vice Chancellor*, that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. And Sir *Lancelot Shadwell* observed, "The stipulations in the articles, as to the mode in which the executors of a deceased partner are to be dealt with, proceed on the supposition that the stipulation that just and true accounts shall be made out, has been complied with. If, however, by reason of the fraud of one of the partners, just and true accounts have not been made out, the ground on which the subsequent stipulations are founded totally fails; and the want of truth and justice in the accounts, lays a foundation for taking a general account." (b)

(a) *Robinson v. Field*, 5 Sim. 14.(b) *Oldaker v. Lavender*, 6 Sim. 239.



## Page 108. line 11.

So a bill in equity lies to recover deposits paid by a shareholder in a joint stock company, where the project is a bubble. Therefore, where on a bill filed by a shareholder, against the directors of "*The Imperial Distillery Company*," it appeared that the defendants caused a delusive prospectus to be issued for the formation of the company, and the bill charged that the stipulated number of shares had not been issued, nor the requisite capital raised: that the directors were proceeding in laying out large sums of money, as if the company was formed, although there was neither an act of parliament nor a deed of settlement to authorise them: that the money paid by the plaintiff had been obtained from him by fraud; and prayed that the defendants might be decreed to repay it with interest, to which bill the defendants demurred: Sir *John Leach*, assuming the several statements in the bill to be true, which the demurrer in form admitted, observed, "Considering that, in substance, the allegations of this bill amount to this, that the prospectus for this undertaking was published, not with any intention to establish a company upon the principles there stated, but as a snare to persons who might unwarily become subscribers, and for the purpose of enabling the directors to make a profit by the sale of shares which they thought fit to assume to themselves, it does appear to me that this case is governed by *Colt v. Woollaston* (a), and upon the authority of that case I overrule this demurrer." (b) So the holders of shares in a joint stock company, purchased immediately from the company, are entitled to relief in equity, against the fraudulent conduct of the directors. (c) And where a partner, who superintended, exclusively, the accounts of the concern, agreed to purchase his copartner's share of the business, for a sum which he knew, from accounts in his possession, but which he concealed from his copartner, was an inadequate consideration; the agreement was set aside. (d)

## Page 112. line 8.

Where one partner contracts that he shall exert himself for the benefit of the partnership, though the Court cannot compel a specific performance of that part of the agreement, yet, there

(a) 2 P. W. 154.

(b) *Green v. Barrett*, 1 Sim. 45.(c) *Blain v. Agar*, 2 Sim. 289.(d) *Maddeford v. Austwick*, 1 Sim. 89.

being a partnership subsisting, the Court will restrain him (if he has covenanted that he will not carry on the same trade with other persons) from breaking that part of the agreement. (a)

Page 113. line 23.

On a demurrer, for want of equity and parties, to a bill for an injunction, to restrain an action against a member of a company for the amount of a call on his share, it was held by the *Vice Chancellor*, that the subscription for shares, required by the Standing Order of the House of Lords, was binding on the subscribers; and that no secret reservation, that certain members were not to be considered liable, will prevent their full liability to the extent of their shares. (b)

Page 114. line 24.

The Court will not appoint a receiver or a manager of a partnership concern, unless the suit be so framed, as that a decree may be made either that the concern shall be carried on according to the terms of an instrument, which by the agreement of the parties is to regulate the mode of its being carried on, or that it shall be wholly put an end to. (c)

(a) *Kemble v. Kean*, 6 Sim. 335. And see *Morris v. Colman*, 18 Ves. 437.; *Kimberley v. Jennings*, 6 Sim. 340.

(b) *Mangles v. The Grand Collier Dock Company*, 4 Jurist, 333.

(c) *Const v. Harris*, 1 T. & R. 517.

## CHAPTER III.

## SECTION I.

*Legal Remedies for Partners against Strangers.*

Page 118. line 20.

IT has been held, that, if a person collude with one partner to injure the others, the latter may maintain a joint action against the party colluding; and that, notwithstanding they may have no joint fund, independent of the general partnership fund, the special damage may be laid as their joint damage. (a) And an individual partner may maintain an action for words, imputing insolvency to him in the way of his trade as one of the partners in a firm, and recover damages alone for that injury; the injury not being considered as affecting the partnership collectively, so as to render a joint action necessary. (b)

Page 120. line 9.

There is another instance in which the right of partners to sue collectively, may, in a court of law, be denied from the conduct of one of their own body, and that is in the common occurrence of one of the firm affixing the joint name to bills, or making use of the partnership funds in discharge of his private debts. In such a case the firm can neither maintain *trover* for the bills, nor *assumpsit* for the money misapplied; because in either of such actions the fraudulent partner must be joined as a plaintiff, and he will not be permitted to annul his own act, so as to make it a ground of action even against the party implicated in the fraud. In a late case, where an attempt was made by a firm to avoid the consequences of the fraudulent conduct of one of its members, by seeking to recover not only bills that had been given in the joint name, but the money of the firm that had been parted with by him in discharge of his separate debt, that partner being neces-

(a) Longman v. Pole, 1 Mood. &amp; Malk. 223.

(b) Harris v. Bevington, 8 C. &amp; P. 708.

arily joined as a plaintiff, the Court of King's Bench held that the action could not be maintained. Lord *Tenterden*, on that occasion, said, "We are not aware of any instance in which a person has been allowed, as plaintiff in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person. It was well observed, on behalf of the defendants, that where one of two persons, who have a joint right of action, dies, the right then vests in the survivor; so that, in this case, (if it be held that *Sykes* and *Bury* may sue,) if *Bury* had died before *Sykes*, *Sykes* might have sued alone, and thus, for his own benefit, have avoided his own act, by alleging his own misconduct. The defrauded partner may perhaps have a remedy in equity, by a suit in his own name against his partner and the person with whom the fraud was committed. Such a suit is free from the inconsistency of a party suing on the ground of his own misconduct. There is a great difference between this case and that of an action brought against two or more partners, on a bill of exchange fraudulently made or accepted by one partner in the name of the others, and delivered by such partner to a plaintiff, in discharge of his own private debt. In the latter case, the defence is not the defence of the fraudulent party, but of the defrauded and injured party. The latter may, without any inconsistency, be permitted to say in a court of law, that although the partner may for many purposes bind him, yet that he has no authority to do so by accepting a bill in the name of the firm for his own private debt. The party to a fraud, he who profits by it, shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action at law." (a)

Page 121. line 7.

And, where one of several partners takes an acceptance for a debt previously due to the firm, this is giving time to the debtor, although the bill be drawn in the name of the single partner only; and the firm cannot sue the debtor for the original debt until the bill has been dishonoured. (b)

(a) *Jones v. Yates*, 9 B. & C. 532.

(b) *Tamlins v. Lawrence*, 3 Moore & Payne, 555



## Page 122. line 18.

And in a case in which it appeared that neither of two partners carried on a separate trade, Mr. Justice *Gaselee* ruled, that a guarantee given to one of them for goods sold by them in the way of their trade, would enure for the benefit of both; and he likewise held, that a guarantee without an address would enure to the benefit of those to whom or for whose use it was delivered. (a) Where a person applied by letter to the partner in a banking house for a loan of money, and engaged with that partner to repay it, and the partner in consequence advanced the money out of the partnership funds, it was held, nevertheless, that the contract was joint, and that all the members of the banking firm might sue upon it. (b)

## Page 123. last line.

Where the condition of a bond recited that the chancellor, masters, and scholars of the University of Cambridge had appointed A., B., and C. their agents, for the sale of books printed at the University Press; and that the defendant had offered to enter into a bond with them as surety; and it was conditioned by such bond, that if the said A., B., and C., and the survivors and survivor of them, and such other person and persons as should or might at any time or times thereafter, in partnership with them or either of them, act as agent or agents of the said chancellor, &c., or their successors, for the sale of books as aforesaid, did and should duly account to the said chancellor, &c. for all books delivered or sent to them, or any or either of them, for sale as aforesaid, and should pay all monies which should become payable to the said chancellor, &c. in respect of such sale, then the obligation should be void; it was held, that by the retirement of C. from the partnership of A., B., and C., the defendant, as their surety, was discharged from all further liability on the bond. (c)

## Page 124. last line.

So, where A., wishing to obtain credit with his bankers, prevailed upon three persons to join him in a promissory note,

(a) *Walton v. Dodson*, 3 Car. & Pay. 162.

(b) *Alexander v. Barker*, 2 Crom. & Jer. 133.

(c) *University of Cambridge v. Baldwin*, 5 Mees. & Wels. 580.

whereby they jointly and severally promised to pay the bankers, or order, a certain sum of money. The bankers gave A. credit in his pass-book for that sum, on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking house, a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not indorsed to them. A., at one time, had, in the hands of his bankers, a balance exceeding the amount of the note. He paid interest to the banking house annually. It was held, that the note being payable to the five members of the banking house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking house. (a)

Page 128. line 2.

Where the defendant in an action of *assumpsit*, brought by two joint plaintiffs, pleaded the bankruptcy of one, and the assignment under the bankruptcy. The replication alleged an assignment of the debt by the bankrupt plaintiff, before the bankruptcy, to the other plaintiff, by virtue of which the latter became solely entitled, and it averred that the action was brought for the benefit of the solvent plaintiff only, the bankrupt joining merely as a trustee; to which the defendant rejoined, that the solvent plaintiff was not so solely entitled. The plaintiffs demurred, but the replication was held to be bad, for not showing that the defendant had notice of the assignment from the bankrupt to the other plaintiff. (b)

Page 128. line 12.

In *Cothay v. Fennell* (c), three parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made a contract for the purchase accordingly; and it was held, that all might join in

(a) *Pease v. Hirst*, 10 B. & C. 122. The action was brought by the payees of the note; and it was held, that it was properly brought in their names, as the note was not indorsed.

(b) *Dean v. James*, 1 Adolp. & Ellis, 809. n. As to the necessity of notice, see *Ryall v. Rowles*, 1 Ves. Sen. 367.; 1 Atk. 177.; *Gordon v. East India Company*, 7 T. R. 237.; *Ex parte Monro*, Buck, 300.; *Ex parte Burton*, 1 Gl. & Jam. 207.; *Ex parte Usborne*, 1 Gl. & Jam. 358.

(c) 10 B. & C. 671.

suing the vendor for a breach of that contract. And the Court observed, that a dormant partner in one instance, might sue, as well as a dormant partner in the general business of a mercantile house.

Page 128. line 31.

In a recent case it appeared a contract had been entered into for five years by A., who had a dormant partner B. A. retired at the end of three years, and after his retirement, B. became the ostensible owner of the business, and carried it on by himself. He then brought an action for a breach of the contract which had been entered into with A. during the partnership. The Court of King's Bench held, that the contract being of a personal nature, he had no right to do so after the dissolution of the partnership; but Lord *Tenterden* said, "It is unnecessary to decide whether, if A. had continued in the partnership till the expiration of the five years during which the contract made by him was to continue in force, the action in the joint names of him and his partner might not have been maintained." (a)

Page 129. line 9.

In *Kell v. Nainby* (b), where an attorney carried on business under the firm of A. and Son, the son was not in fact a partner, but acted as clerk to his father, and received a salary, it was held that A. might maintain an action in his own name to recover the amount of a bill for business done. And Mr. Justice *Parke* said, a party with whom the contract is actually made may sue without joining others with whom it is apparently made.

Page 130. line 20.

So, where a contract of a personal nature continuing through a term of years has been entered into with an ostensible partner alone, who before the expiration of the contract retires, and thereby disables himself from performing his part of the contract, the party with whom the contract was made has a right to consider it as at an end, and it will not enure to the benefit of a dormant partner. Thus A., a coachmaker, entered into an agreement to furnish B. with a carriage, for the term of five

(a) *Robson v. Drummond*, 2 B. & Adolp. 307.

(b) 10 B. & C. 20.

years, at seventy-five guineas a year. At the time of making the contract C. was a partner with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of the first three years the partnership between A. and C. was dissolved, A. having assigned all his interest in the business and in the contract in question to C., and the business was afterwards carried on by C. alone. B. was informed by C. that the partnership was dissolved, and that he (C.) had become the purchaser of the carriage then in his, B.'s, service. The latter answered, that he would not continue the contract with C., and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of A. and C., against B., for the two payments which, according to the terms of the contract, would become due during the last two years of its continuance, it was held, that the action was not maintainable, the contract being personal, and A. having transferred his interest to C., and thereby become incapable of performing his part of the agreement. (a)

Page 130. line 25.

Where the defendant had been employed as an accountant by three partners to investigate the accounts of the partnership, and to ascertain the balance due to each partner, it was held that an action might be maintained by one of the partners for the negligence of the defendant, whereby that partner received less than he was entitled to; *Maule J.* observing, that there was evidence of a several retainer, that is, by the firm on the one hand, and the several members of it on the other, and that there was equally an employment by the individuals as the firm. (b)

Page 132. line 31.

Where a policy was effected by A. upon her own life with an Insurance Company by a deed which was executed by three trustees of the company. A. afterwards assigned it to B. and died. The money due on the policy was paid to B. by a check

(a) *Robson v. Drummond*, 2 B. & Adolp. 303. *Patteson J.* observed, "This is, in substance, a case where a person, having made a contract in his own name, attempts to back out of it, and transfer it to a third person. That he had no right to do."

(b) *Storey v. Richardson*, 4 Jurist, 26.



drawn by the trustees on the bankers of the company, and he gave an acknowledgment of having received the money from the trustees. By the deed of trust, the Board of Directors were to cause all monies belonging to the company to be deposited with the bankers of the company in the name of the trustees, and such monies were not to be withdrawn but for the purposes of the company, and by checks signed by the trustees, or by three or more directors, under some authority to be given by the trustees. After the payment to B., it was discovered that the policy was void on account of fraud, and it was determined, that under these circumstances, the three trustees were the proper plaintiffs in an action to recover back the money. (a) It was contended in this case for the defendant, that if he was not estopped by having treated with the plaintiffs as trustees, the action ought to have been brought in the names of all the members of the company (b); and it was not competent to the members of the association to transfer to others the right of bringing actions, which the law vested in all the parties interested, for a mere right of action cannot be transferred. (c) But *Littledale J.* said, "I agree that it is not competent for such an association as this to transfer to a few of its members the right of bringing actions, which, by law, is vested in all; but if a party, instead of contracting with all the members of such a company, choose to contract with those trustees in whom the property of all is vested, and afterwards in virtue of that contract to receive money from those trustees to which he has no right, I think it is not competent to that party, to say, that they are not the persons entitled to sue for it."

Page 133. line 18.

By the 7 Geo. 4. c. 46. s. 4. it is enacted, that, before any corporation or copartnership, exceeding the number of six persons, who carry on the business of banking in *England*, "shall begin to issue any bills or notes, or borrow, owe, or take up any money on their bills or notes, an account or return shall be made out according to the form contained in the schedule, wherein shall be set forth the true names, title, or firm of such intended or existing corporation or copartnership, and also the names and places of abode of all the members of such copartnership, or of

(a) *Lefevre v. Boyle*, 3 B. & Adolp. 877.

(b) 1 Wms. Saunders, 154, note (1).

(c) *Co. Litt.* 214. a. 266. a.

all the persons concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in *England*, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, and also the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation, or by their agent or agents; and every such account or return shall be delivered to the Commissioners of Stamps, at the Stamp Office in *London*, who shall cause the same to be filed and kept in the said Stamp Office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of the sum of one shilling for every search." The fifth section enacts, "that such account or return shall be made out by the secretary or other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary or other public officer, taken before any justice of the peace, and which oath any justice of the peace is hereby authorised and empowered to administer; and that such account or return shall, between the twenty-eighth day of February and the twenty-fifth day of March in every year, after such corporation or copartnership shall be formed, be in like manner delivered by such secretary or other public officer as aforesaid, to the Commissioners of Stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned." The sixth section enacts, "that a copy of any such account or return so filed or kept and registered at the Stamp Office, as by the act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the Commissioners of Stamps for the time being, upon proof made that such certificate has been signed with the hand-writing of the person or persons making the same, and whom it shall not be necessary

to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return." In the construction of this act of parliament, it has been held, that in an action brought by a public officer on the behalf of a banking company, the return to the Stamp Office is not the only admissible evidence of his being one of the public officers, but it may be proved *aliunde*. Mr. Justice *Parke* observed that, "by the fifth section it is enacted, that the return to the Stamp Office, directed in the latter part of section 4., shall be made by the secretary or other person 'being one of the public officers appointed as aforesaid.' By this section, therefore, it is clear that the officer may be appointed, and act, previously to the return, for the officer himself is to make the return. And the act evidently contemplates that these companies, when formed, may sue or be sued, although the time may not have come for making the returns." And Mr. Justice *Taunton* said, "I think it is not essential for companies, under this act, to prove the return to the Stamp Office in any actions, but those brought by them upon bills issued by themselves, within the fourth section; but it is unnecessary to pronounce an opinion on that point now." (a) And in another case, it was determined, that to entitle a banking company to sue by its public officer, it is sufficient, if, in the return made to the Stamp Office, he be described as A. B. Esq. of, &c., a "public officer" of the copartnership; at least, in the absence of proof that he had any specific office, it will not be presumed that he was more than an officer appointed for the purpose of suing and being sued. (b) And the right of such a company to sue by its public officer will not be defeated, if it appear that, in the return to the Stamp Office, the places of abode of one or more partners are omitted, where there is no evidence that the return varies in this respect from the company's books: and even if such proof were given, it seems that the return, if correct as to the public officers, would still be sufficient to maintain the action. Lord *Tenterden* said, "With regard to the objection, that in some instances the places of abode of the

(a) *Edwards v. Buchanan*, 3 B. & Adolp. 788.

(b) *Armitage v. Hamer*, 3 B. & Adolp. 793.

partners are not specified in the return, I think all the act requires is, that the names and places of abode be specified as they appear on the books. *Non constat*, in this case, that they were not." And Mr. Justice *Parke* observed, "I do not mean to say, that even if it had been proved that the return, in omitting the places of abode of some members, had not corresponded with the books, that would have been a valid objection to the plaintiffs' right to recover: my present opinion is that it would not; and I think it would be very inconvenient if a company like this, suing by its public officer, were on every occasion obliged to produce its books to show that the return was correct." (a) So, in an action brought by a banking copartnership in the name of their public officer, it is sufficient in the declaration to describe the plaintiff as the duly appointed public officer of the company; and it is no ground of objection on demurrer to allege, that it does not appear, on the face of the declaration, that he was a member of the copartnership, and resident in *England*, and duly registered in the manner prescribed in the fourth section. (b)

Page 141. line 10.

The general rule is, that a partner with the plaintiff is not an admissible witness to prove the contract declared upon, on the ground of his interest in the result of the action; and it seems, he cannot be rendered competent by the statute 3 & 4 Will. 4. c. 42., that statute not applying to partners. (c)

(a) *Armitage v. Hamer*, 3 B. & Adolp. 793.

(b) *Spiller v. Johnson*, 4 Jurist, 367.

(c) *Jackson v. Galloway*, 8 C. & P., 480.



## CHAPTER IV.

## SECTION I.

*Legal Remedies against Partners.*

Page 147. line 3.

THE law does not imply any authority for one of several persons jointly interested in a farm, to bind the others by bills of exchange. (a) Neither will an authority in the directors of a mining company to draw or accept bills so as to bind the shareholders, who are partners, be implied. (b)

Page 154. line 30.

On the same principle, where a partner borrows a sum of money, and gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes, with the knowledge of the other partner; the character of the debt being to be determined by the security taken for it. (c)

In joint stock companies to empower the directors to exercise the implied authority existing in ordinary partnerships from the relation of partner, it must be shown that a complete partnership has been formed, in which case one partner does communicate to the other standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged. But if the acts and conduct of a shareholder relied upon as showing that he is, in point of fact, a partner, and therefore bound by the engagements of the directors in the course of the partnership, are equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things are done, as with that of an existing partnership, it seems that

(a) *Greenslade v. Dower*, 7 B. & C. 635.; S. C. 1 Mann. & Ryl. 640.(b) *Dickinson v. Valpy*, 10 B. & C. 128.(c) *Bevan v. Lewis*, 1 Sim. 376.

will not be sufficient to establish that he is actually a partner. In *Dickinson v. Valpy* (a), Mr. Justice *Parke* observed, “ There is a great difference between the two cases. If there is a contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract are unconditional or complete, the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the mean time enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorised them (always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having, in substance, given that authority). In those cases in which a plaintiff has not been induced by the defendant’s representation to give credit to him, but seeks to fix him because he has really authorised the contract to be made, the plaintiff must show that authority, and an authority upon condition not performed, is no authority at all.” The law affecting this subject was clearly expounded by Lord Chief Justice *Tindal* in a recent case (b), in which the question was, whether the defendants were liable for certain work done by the plaintiff, under a contract with the directors of the ‘ *Imperial Distillery Company*,’ on the ground of their being actual partners in that undertaking, and the facts of which case may be collected from the luminous judgment of the Lord Chief Justice. His Lordship said, “ The question must be considered, whether, upon the facts of this case, the defendants were partners in the *Imperial Distillery Company* with the directors and other shareholders at the time this contract was made; for, by the general rule of law relating to partnerships in trade, each would then be liable to the debts of the whole company, contracted in the course of the trade. This is a consequence not confined to the law of this country, but extending generally throughout *Europe* : and it is founded, partly on the desire to favour commerce, that merchants in partnership may

(a) 10 B. & C. 141. ; S. C. 5 Mann. & Ryl. 126.

(b) *Fox v. Clifton*, 6 Bing. 776. ; S. C. 4 Moore & Payne, 712.

obtain more credit in the world; and, more especially, on the principle that the members of trading partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership; so that, by the contracts of the agent, all his principals are bound. (See Pothier, *Traité du Contrat de Société*, c. 6. s. 1.) The question, therefore, becomes this; whether, at the time of this contract made by the directors, the relation between the defendants and them was such, that the directors were constituted the agents of the defendants to bind them by their contracts. The first act done on the part of the defendants, is an application by letter from each of them, except one, requesting the name of the party to be inserted for a certain number of shares in the *Imperial Distillery Company*, and engaging to make payment thereon. All these letters appear to have been written between the 2d and 21st of *March*; and so completely was the company unformed at the time, that the letters were addressed to Messrs. *Fishers* and *Norcutt*, who acted as solicitors for the persons, whoever they might be (for it does not distinctly appear), who were endeavouring to establish the concern. On the 19th of *March*, a public meeting was held, which was attended by many persons, whether by the defendants or not there is no evidence; at which meeting, according to the language of the secretary, ‘the company was formed.’ On the 23d of *March*, an advertisement appears, headed ‘*Imperial Distillery Company*, capital 600,000*l.*, in 12,000 shares of 50*l.* each,’ giving the names of the trustees and other officers, and advertizing to other particulars, which it will be necessary to refer to afterwards. It was not until the 24th, the day following the advertisement, that an answer was sent to the different applicants, signed by the secretary, who had been appointed in the mean time, informing them that the directors had appropriated a certain number of shares to each, and requesting them to pay a deposit of 5*l.* per share before the 28th of *March*. Now, the advertisements described the proposed undertaking as ‘*The Imperial Distillery Company*.’ It is said, this description assumes that it is a company already formed; but the very circumstance of publishing an advertisement, proves that it was only a project for a company, not a company actually formed; for, if the 600,000*l.* had been subscribed, and the 12,000 shares allotted, why publish an advertisement? It could only be intended for the purpose of inducing others to subscribe.

The description, employed in the advertisement, of the advantages to be gained by the subscribers, proved also the object of the publication : and the conclusion points more distinctly to the future formation of a company : it states that ‘ a deed of settlement will be prepared forthwith, which must be executed within thirty days after the same shall be ready for that purpose ; and every person who shall neglect to execute the same within that time, shall forfeit all share and interest in the company. The deed is to contain all such clauses and conditions as the standing counsel and solicitors to the company shall deem necessary. The shares will be forthwith allotted ; and, until offices are taken, all communications are requested to be made to the directors, at the *City of London Tavern.*’ Now, this advertisement is the basis of the contract between the parties ; it is upon the footing of this prospectus that the seven defendants had their shares allotted to them, and paid their deposits : if they are not partners under this agreement, they are not partners under any ; for they neither exchanged their scrip-receipts or certificates of shares, nor executed the deed when prepared, nor paid a second call when made, nor appeared at any meeting, nor interfered with any concerns of the company, nor did any act subsequent to the making this contract, nor any act before, other than applying for shares, and paying the deposit of 5*l.* per share, when they learnt, from the letter of the secretary, that a certain number of shares was appropriated to them. The paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement ; that is, an assent to become partners in a company, raising a capital of 600,000*l.*, consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future ; but we think it implies nothing more, and that it cannot be construed as an assent to the terms of the partnership already formed. When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7,500 ; when, out of that number, no more than 2,300 ever paid the first instalment ; when not half the latter number paid the second instalment, and only 65 subscribers signed the deed, — we think the subscribers were at liberty to say, This was not the trading company upon which we paid our deposit ; neither the capital, nor the number of shares, bearing any reasonable proportion to the original plan and project. And this the more



especially, because, by the terms of the advertisement, they were taught to expect, that the utmost risk, which they encountered, was the loss of all share and interest 'in the concern,' upon their refusal to execute the deed; which loss they appear to have submitted to. There are no facts subsequent to the payment of the deposit, which in any manner affect the seven defendants. On the 30th of *June*, the deed was prepared for signature, and shortly afterwards signed by the directors and those of the shareholders who paid the second instalment, not exceeding sixty-five in number: and it is not immaterial to observe, that so little was the partnership considered as fixed before the execution of the deed, that, according to the evidence of the secretary, any person producing the scrip-receipt, and paying a second call, whether an original subscriber or not, was permitted to execute the deed. The defendants, however, on this record, with the exception of *Plummer*, never executed the deed, nor did any more than two of them ever pay the second instalment. On the 16th of *July*, there was an advertisement in the Gazette, making a second call for 5*l.*, and informing the subscribers, 'that it had been determined by the directors, that no scrip-holders could receive shares for scrip, until he had first signed the deed of settlement; and no scrip could be exchanged for shares after *Monday* the 18th instant.' The defendants, except as above, neither exchanged their scrip, nor executed the deed. On the 12th of *August*, the directors advertised that the deposits would become forfeited on all scrip for which the deed of settlement was not signed and the first call paid, on or before the 23d. And on the 27th of *August* a second advertisement appeared, declaring 'that such deposits on the now outstanding scrip were forfeited for the use and benefit of the proprietors; and authorising applications to be made for the shares so forfeited.' At this moment, therefore, the consequence had followed which the original prospectus had declared, viz. 'the forfeiture of the deposits, and all interest and share in the concern;' and no subsequent offer by the directors, to allow the subscribers to be restored to their shares upon the execution of the deed, could alter their relation to each other, unless assented to by themselves. Upon this first question, therefore, whether a partnership was actually formed, we think, if the right to participate in the profits of the joint concern is to be taken, as undoubtedly it ought to be, as a test of the partnership, these

defendants were not entitled at any time to demand a share of profits, if profits had been made, inasmuch as they had never fulfilled the conditions upon which they subscribed. We think the matter proceeded no farther than that the defendants had offered to become partners in a projected concern, and that the concern proved abortive before the period at which the partnership was to commence; and therefore, with respect to the agency of the directors, which is the legal consequence of a partnership completely formed, we think the directors proceeded to act before they had authority from these defendants; for they began to act in the name of the whole, before little more than half the capital was subscribed for, or half the shares were allotted. The persons, therefore, who contracted with the directors, must rest upon the security of the directors who made such contract, and of those subscribers who, by executing the deed, had declared themselves partners, and of any who have, by their subsequent conduct, recognised and adopted the acts and contracts of the directors; but they have not the security of the present defendants, who are not proved by the evidence to stand in any one of such predicaments." The question what acts make a subscriber to a joint stock undertaking an actual partner, so as to entail upon him responsibility for the debts of the concern, was afterwards considered in the Court of Exchequer, in the case of *Pitchford v. Davis*. (a) There it appeared in evidence that in 1836, prospectuses, containing the names of the directors, were issued for the formation of a company under the name of "*The United Kingdom Beet Root Sugar Association*," with a capital of 250,000*l.*, in 10,000 shares, of 25*l.* each. In *June* 1836, the defendant paid deposits on shares, which had been previously at his request allotted to him. During the summer, the company, with the defendant's privity, commenced building their works, and shortly afterwards a call was declared and paid. The goods for which the action was brought were supplied in *December* 1836, and the following *January*, by the plaintiffs to the company by the order of their secretary. It was not proved that the defendant interfered in the management of the concern, but it was shown that on one occasion he was at the manufactory, when he said he understood the nature of the works and the mode of manufacturing sugar. On the cross-

(a) 5 Mees. & Wels. 2.

examination of the plaintiff's witnesses, it appeared that only a small part of the proposed capital had been subscribed for, and that not more than 1400 out of the 10,000 shares had been taken. The jury having found a verdict for the defendant, the Court afterwards refused a rule *nisi* for a new trial. On that occasion Lord *Abinger* said, "The question is, whether the directors were the agents of the defendant in carrying on the business with so small a capital. I thought at the trial, and am still of the same opinion, that where a prospectus is issued and shares collected for a speculation to be carried on by means of a certain capital, to be raised in a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that respect are fulfilled. But if it be shown that he knows that the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts. In this case there was very little, if any, evidence to show that; and I am satisfied with the finding of the jury." *Parke B.* "The defendant, by taking shares in this speculation, gives authority to the directors to bind him by their contracts, in the event of the proposed number of shares being disposed of, and the proposed capital obtained. The secretary who gives the order to the tradesman is the party primarily liable; the directors also, who give the order to the secretary, may be liable. A third party may become liable, if it can be shown that he has authorised the act of the directors in making the contract. But by proving the defendant to be an original subscriber, unless the proposed capital is raised, no such authority is shown." *Alderson B.* "The authority given by the subscribers to the directors is a conditional one, depending on the terms of the prospectus being fulfilled. In this case that condition has not been fulfilled, and therefore the defendant is not bound by the contract of the directors."

Page 155. line 10.

Lord *Tenterden*, when the case of *Vice v. Lady Anson* was before him at *Nisi Prius*, observed, "The partnership, if any, is not strictly a trading partnership; it is one formed for the purpose of working a mine, a species of real estate, and the plaintiff's claim is for labour and goods employed in working that mine. An interest in a real estate can only pass by certain for-



malities; and it is clear that the certificates are not sufficient to pass it, nor would the registration in the act book of the company, as mentioned in them, even if it were made, of which there is no proof, be so. The question is, whether it is made out that Lady *Anson* had any interest in the mine? I think it is not.” (a) And, on a motion to set aside the nonsuit, the counsel having urged that it was not necessary to show any formal conveyance of an interest in the mine, and that being a shareholder, and having spoken of being one, was evidence against the defendant that she had an interest in the working of the mine, Lord *Tenterden* said, “The fact of her having thought that she had such an interest, that being wholly unknown to the plaintiff at the time when he supplied the goods, will not make her liable for those goods. Her having expressed an opinion that she was so, might be *primâ facie* evidence that she had an interest; but the other facts in the case show that she had not any interest. She thought she had an interest, because she had paid her deposits and received the certificates, but those certificates pass no interest whatever. The defendant therefore has no interest in this mine, and is not liable in this action.” (b)

Although in trading copartnerships each member is bound by the acts of the rest, yet that principle does not extend to any other species of association, and has been expressly held not to apply to mining companies. Thus, in *Dickinson v. Valpy* (c), it was held that the member of a mining company could not be sued on bills of exchange drawn by the directors, unless it were shown to the jury by evidence that, according to the general usage, such companies had power to draw bills to bind their members. (d) But in an action for goods supplied to the use of a mining company, of which the defendant was a member, the fact of the defendant being a shareholder, coupled with his having signed a requisition for the purpose of removing one of the directors, was held to be evidence to go to the jury, that he knew the directors were working the mine, and that they had his concurrence in so doing. (e)

(a) 1 Mood. & Malk. 99.

(b) S. C. 7 B. & C. 413.

(c) 10 B. & C. 128.; S. C. 5 Mann. & Ryl. 126. And see *Bentley v. Bates*, 4 Jurist, 552.

(d) See also *Fleming v. Hector*, 2 Mee. & W. 172.

(e) *Tredwen v. Bourne*, 4 Jurist, 747. Mr. Baron *Parke* observed, “In this case, in order to establish the liability of the defendant, it is shown, first, that he was a shareholder in this company; but then it may be said, that he has thereby only



## Page 156. line 26.

So, where A. and B. dissolved partnership, and agreed that the business should be carried on by B. alone; and that he should receive and pay all debts, and sufficient partnership funds for that purpose were left in his possession. C., a creditor of the firm, subsequently to the dissolution made application to B. for payment of his debt, who informed him that A. was ignorant of it, and that C. must look to B. alone. C. then drew a bill on B., which he accepted, but which was afterwards dishonoured; it was held in an action brought by C. against A. and B. (the latter having become bankrupt), that it was a question for the jury, whether it had been agreed between C. and B. that C. should accept B. as his sole debtor, and take his acceptance in satisfaction of the debt due from the partnership. And it was also determined, that such an agreement and receipt of the bill would be a good defence to C.'s suit, by way of accord and satisfaction; and that the fact of B. having had the partnership effects left in his hands, and having agreed with A. to pay all the partnership debts, was evidence of an authority from A. to make such an agreement on his behalf. (a) Lord *Denman*, in delivering the judgment of the Court, said, "It cannot be doubted, but that if a chattel of any kind had been, by the agreement of the plaintiffs, and both the defendants, given and accepted in satisfaction of the debt, it would have been a good discharge. It is not required that the chattel should be of equal value, for the party receiving it is always taken to be the best judge of that in matters of uncertain value. (b) Nor can it be questioned, but that the bill of exchange of third persons, given and accepted in satisfaction of the debt, would be a good discharge. But it is contended, that the acceptance of a bill of exchange by one of two debtors cannot be a good satisfaction, because the creditor gets nothing which he had not before. The written security, however, which was negotiable and transferable, is of itself some-

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rendered himself liable, on the condition that 3000 shares should be raised, and that only 2000 were actually disposed of. The fact of his being a shareholder certainly would not, under these circumstances, be sufficient to render him liable, if the case rested on that fact alone."

(a) *Thompson v. Percival*, 5 B. & Adolp. 925.

(b) *Andrew v. Boughey*, Dyer, 75. a.

thing different from that which he had before ; and many cases may be conceived, in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties, or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways : and whether it was actually more beneficial in each particular case, cannot be made the subject of inquiry. The cases of *Lodge v. Dicas* (a) and *David v. Ellice* (b) are said to be against this view of the law. In the former, however, no new negotiable security was given, nor does the difference between the joint liabilities of two, and the separate liability of one, appear to have been brought under the consideration of the Court. In the latter, no bill of exchange was given, and that decision, on consideration, is not altogether satisfactory to us. We cannot but think that there was abundant evidence in that case to go to a jury (and upon which the Court might have decided) of the payment of the old debt by *Inglis, Ellice, & Co.*

the plaintiff, and a new loan to the new firm, which might have been as well effected by a transfer of account by mutual consent as by actual payment of money. The cases of *Evans v. Drummond* (c) and *Reed v. White* (d) are authorities the other way. In the former, Lord *Kenyon* points out forcibly the altered relation of the parties by the substitution of the bill of the remaining partner for that of the firm ; and it is difficult to see on what ground he decided the case, unless upon this, viz. that such substitution under an agreement operated as a satisfaction, as far as regarded the retiring partner ; and in *Reed v. White*, Lord *Ellenborough* acted upon that authority, and so directed a special jury of merchants, who entirely agreed with him. These cases were afterwards brought to the notice of Lord *Ellenborough*, who expressed his approbation of them, in *Bedford v. Deakin*. (e) That case, however, (which was also before the Court in 2 B. & A. 210.) was distinguished from them, because the creditors there expressly reserved the liability of the original debtors. If, therefore, the plaintiffs in this case did expressly agree to take, and did take, the separate bill of exchange of B. in satisfaction of the joint debt, we are of opinion that his so doing amounted to a discharge of A."

(a) 3 B. & A. 611.

(b) 5 B. & C. 196.

(c) 4 Esp. N. P. C. 92.

(d) 5 Esp. N. P. C. 122.

(e) 2 Stark. N. P. C. 173.

Page 175. line 17.

Where one partner has become bankrupt and obtained his certificate, it is not now necessary, in an action against the firm, to join him, the stat. 3 & 4 Will. 4. c. 42. s. 9. having enacted, "that to any plea in abatement in any court of law of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an Act for the Relief of Insolvent Debtors."

Page 178. line 8.

By the general rules of Hilary Term, 4 Will. 4., Infancy must now be specially pleaded both in the actions of *assumpsit* and debt. (a)

Page 179. line 13.

In the recent case of *De Mautort v. Saunders* (b), which was an action upon a bill of exchange drawn upon two persons, by the name of *Saunders, Brothers, & Co.*, to which the defendants pleaded, that the promises in the declaration were made by two other persons named in the plea jointly with the defendants, and the defendants proved, that although they carried on business in *London*, under the firm of *Saunders, Brothers, & Co.*, two other persons named in the plea, who resided at the *Mauritius*, where the bill was drawn, were in fact in partnership with them, and that the plaintiff resided at the *Mauritius*; it was determined, that upon this evidence the jury were properly desired to find for the plaintiff, if they thought the holder of the bill had reason to consider that the defendants alone constituted the house of *Saunders, Brothers, & Co.*, the question being with whom the plaintiff contracted. Mr. Justice *Parke*, in the course of his judgment, observed, "It is true that in *Dubois v. Ludert* (c), it was decided, that a defendant might plead in abatement a secret partnership, although the plaintiff had no means of knowing of that partnership; but the decision in that case is at variance with the decision of Lord *Kenyon* in *Doo v. Chippenden* (d), of Lord *Ellenborough*, in *Baldney v. Ritchie* (e), and of Lord *Tenterden* in *Mullett v. Hook*. (g) Those

(a) Reg. Gen. H. T. 4 Will. 4. Assumpsit, 3.; Debt, 3.

(b) 1 B. & Adolp. 398.

(c) 1 Marsh. 246.; S. C. 5 Taunt. 609.

(d) Cited in Abbott on Ship. 76.

(e) 1 Stark. 338.

(g) 1 Mood. & Malk. 88.

cases establish, that upon such a plea as that pleaded in his case, the only question is, with whom the contract was made. When the plaintiff took a bill of exchange, drawn upon *Saunders & Co.* in *London*, he must have understood that that bill would be paid by the persons who were the ostensible partners in that house, and therefore, when it appeared that the defendants were the two partners who transacted the business in *London*, it was incumbent on them to show that the plaintiff had trusted the other two persons; for if a person contract with two others, he may sue them only; if, after the contract be made, he discover that they had a secret partner, who had an interest in the contract, he is at liberty to sue that secret partner jointly with them, but he is not bound so to do. I think, therefore, that the case of *Dubois v. Ludert* cannot be supported. The two persons who carried on the business at the *Mauritius* must be considered as dormant partners in the house in *London*, and the jury having found that the plaintiff had no reason to consider that they were such partners, the issue joined on the allegation in the plea, that the promises mentioned in the declaration were made by the defendant jointly with the other two persons named in the plea, was properly found in favour of the plaintiff." The rule as to joining dormant partners as defendants applies only to cases of implied contract; where the contract is express and is entered into in writing with the ostensible partner only, the party with whom the contract is made cannot sue the dormant partner upon it. (a)

Page 189. line 21.

In a late case, B. and C. being jointly indebted to A., the latter sued B. alone, and upon his remonstrating upon the hardship of his being compelled to pay the whole debt, and offering to pay a proportionate share with the costs of suit, A. accepted the offer, and a receipt was given for the sum paid, which was stated to be the amount to be taken for debt and costs in *that action*. A. afterwards commenced an action against C.; and it was determined, that the composition above mentioned did not operate as a discharge of the whole debt, but only to relieve B., and, therefore, it was no defence for C. (b) Parke J. observed, "The result of the whole is, that it does not operate as a release, or matter which could have been pleaded as an accord and

(a) *Beckham v. Knight*, 4 Bingh. N. C. 245.

(b) *Watters v. Smith*, 2 B. & Adolp. 589.



satisfaction, but amounts merely to an engagement not to sue B., which can only be pleaded by himself; if the action, therefore, had been brought against two parties, it would not have been a discharge to both. Or, it may be considered as a release to one, qualified by a reservation of the plaintiff's rights against the other, as in *Solly v. Forbes*." (a)

Page 196. line 17.

So, after the death of one maker of a joint and several promissory note which had been made by two, a payment upon it by the executor of the deceased, will not prevent the operation of the Statute of Limitations as against the survivor. (b) Where the joint contract has been severed by death, nothing can be done either by the survivor, or the personal representative of the deceased, to take the debt out of the statute as against the other. (c)

Page 200. line 7.

In the recent case of *Wilson v. Hirst* (d), which was an action against B. and C. to recover the balance of a banking account, which commenced in 1822 and ended in *November* 1831, the right of the plaintiffs to their demand depended on the rate of interest which they were entitled to charge according to the understanding of the parties during their transactions together. The defendants, to prove their case on this point, proposed to call D., who stated on the *voir dire*, that he was a partner with B. and C. from 1822 to *June* 1831, and that the partnership accounts as between himself and them were still unsettled. Between the witness's retirement and *November* 1831, considerable sums had been paid in and drawn out by the defendants, but the general balance had not been materially altered. Since the witness's retirement, B. and C. had asked time of their creditors to pay their debts. General releases *inter alia* of "all demands" from B. and C. to D., and from D. to B. and C., were executed; and it was held, that by these releases D. was rendered a competent witness. Lord *Denman*, in delivering the judgment of the Court, observed, "The plaintiffs have now made another

(a) 2 Br. & B. 38.

(b) *Slater v. Lawson*, 1 B. & Adolp. 396.

(c) *Id. ibid.* *Atkins v. Tredgold*, 2 B. & C. 23. And see *Braithwaite v. Britain*, 1 Keen, 206.; *Winter v. Innes*, 4 Mylne & Craig, 111.

(d) 4 B. & Adolp. 760.

objection to the witness, which does not appear to have been urged at the trial; viz. that if the defendants should obtain a verdict, and the plaintiffs should afterwards bring an action against the witness for the same debt, that verdict, and judgment upon it, might be pleaded in bar to such an action, and he therefore comes to relieve himself from a liability to pay the debt. But, he is equally relieved from liability to pay the debt, if the plaintiffs obtain a verdict; because the defendants, having released him, cannot call on him for contribution, and, consequently, in a legal point of view, he stands equally indifferent whichever way the verdict is. There is no doubt, however, but the witness would feel himself more safe from future liability, if the defendants were to obtain a verdict; but that would only affect his credit, and does not create any legal incompetency. It is, however, to be observed that the case of *Cheyne v. Koops* (a) seems contrary to this; from the statement in the early part of the case, it appears that mutual releases were proposed to be given, but that Lord *Alvanley* thought that was not sufficient to make the partner competent; but, in the latter part of the case, he said, if the defendant gave a release to the witness, he would allow him to be examined and a verdict taken, subject to the opinion of the Court; but the defendant was not in court, and the witness was not examined. We think, however, the reasoning of Lord *Alvanley* would not make the witness incompetent, and we are therefore of opinion that D. was a competent witness." (b) The late statute of the 3 and 4 Will. 4. c. 42. s. 26., which, in order to render the rejection of witnesses on the ground of interest less frequent, enacts, "that if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him," and by sec. 27. enacts, "that the name of every witness objected to as incompetent on

(a) 4 Esp. N. P. C. 112.

(b) See also *Jones v. Pritchard*, 2 Mees. & Wels. 199.

the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence," does not render a partner a competent witness for his copartner. (a) The enactment merely makes those witnesses competent whose interest only is, that the verdict or judgment may be used as evidence for or against them (b), and does not provide against the incompetency of such as have a direct interest in the subject matter of the action, and who are not affected, as far as relates to proceedings, by the verdict or judgment. (c)

Page 202. line 16.

But where A. and B. made a joint and several promissory note for a sum of money with interest, and B. being sued solely, pleaded illegality of consideration; it was held, that A. was not a competent witness to support this plea; and that it made no difference that A., before action brought, had paid half the amount of the note, a year's interest being also due at the time of such payment, inasmuch as A., in case a verdict were given against B., would be liable to contribution in respect of that interest. (d)

Page 208. line 8.

In a late case an injunction was granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners, who died before the writ was delivered to the sheriff, on the ground that the writ of execution bound the property only from the time of its delivery to the sheriff, at

(a) *Jackson v. Galloway*, 8 Car. & Pay. 480.

(b) 2 Mees. & Wels. 421.

(c) *Bowman v. Willis*, 3 Bingh. N. C. 671. *Green v. Warburton*, 1 Mood. & Rob. 106.

(d) *Slegg v. Phillips*, 4 Adolp. & Ellis, 852. *Patteson, J.* said, "I admit that, if he had paid all which the defendant could obtain by way of contribution, his interest would be gone."

which time the property in the partnership goods had vested, at law, in the surviving partner. (a)

Page 208. line 33.

It may be useful to inquire into the rights which the creditors of a joint stock company have against the shareholders, as far as regards the power of such creditors issuing execution against any shareholder individually, upon a judgment recovered against the public officer of the company. The statute which has been most frequently brought under the notice of Courts of law on this subject is the 7 Geo. 4. c. 46. relating to banking companies, and the twelfth section of which enacts, "That all and every judgment and judgments, decree or decrees, which shall at any time after the passing of this act be had or recovered or entered up as aforesaid, in any action, suit, or proceedings in law or equity against any public officer of any such copartnership, shall have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such copartnership; and that the bankruptcy, insolvency, or stopping payment of any such public officer for the time being of such copartnership, in his individual character or capacity, shall not be nor be construed to be the bankruptcy, insolvency, or stopping payment of such copartnership; and that such copartnership and every member thereof, and the capital stock and effects of such copartnership, and the effects of every member of such copartnership, shall in all cases, notwithstanding the bankruptcy, insolvency, or stopping payment of any such public officer, be attached and attachable, and be in all respects liable to the lawful claims and demands of the creditor and creditors of such copartnership, or of any member or members thereof, as if no such bankruptcy, insolvency, or stopping payment of such public officer of such copartnership had happened or taken place." And by the thirteenth section it is enacted, "That execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution

(a) *Newell v. Townsend*, 6 Sim. 419.



against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts or engagement or engagements in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: Provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open court, by the Court in which such judgment shall have been obtained, and which motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership."

In *Bartlett v. Pentland* (a), which, however, was a case arising out of the act of the 5 Geo. 4. c. 160., for establishing the *St. Patrick Assurance Company of Ireland*, a judgment had been obtained against the secretary of that company, and the plaintiffs, without entering any suggestion on the record, or applying to the Court for leave, sued out a *capias ad satisfaciendum* against one of the members of the company, who was taken in execution upon it, and the Court of King's Bench, on a rule for setting aside the execution, held, that a party who had brought an action and obtained judgment against the secretary, could not lawfully issue execution against another member of the company without having previously, by leave of the Court, suggested on the record facts to show that the party against whom he so issued execution was liable as a member of the company. And this principle was laid down in that case; that wherever, by the provision of an act of parliament, a person not a party to the record is to be affected by a judgment, or where the judgment is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is to enter a suggestion on the roll, so that the party to be affected may demur, if the plain-

(a) 1 B. & Adolp. 704. S. P. Barton v. Hunter, 1 Hudson & Brooke's Rep K. B. Ireland, 569.

tiff do not set forth facts to bring the case within the act of parliament, or that he may traverse those facts if untrue. But the three Courts of Queen's Bench, Common Pleas, and Exchequer have subsequently and separately determined, that where judgment has been obtained against a banking company, sued in the name of their public officer, according to the provisions of the 7 Geo. 4. c. 46., the proper mode of proceeding, to affect the other members of the company with the damages and costs in the action, is not by allowing a suggestion to be entered on the roll, but that it is necessary for the plaintiff to proceed against them by *scire facias* upon the judgment. (a) And this distinction was taken between the proceeding by *suggestion* and that by *scire facias*; that where new parties are to be introduced either to take the benefit of or become chargeable by a judgment, the proceeding by *scire facias* has been the uniform course, and that all the instances of suggestions are suggestions of facts between the parties to the record, such as a change of names, the allowance or denial of costs under acts of parliament, and other similar matters. (b) Lord *Abinger*, in the case of *Cross v. Law*, alluded to this inconvenience to the creditor, for he observes, "It is true that the effect of these joint stock acts is to place the public in rather a disadvantageous position, for every one who sues the public officer of a company is exposed to the hazard of the trial of two actions; inasmuch as he is compelled first to bring his action to establish the liability of the company; and secondly, to establish that right against the individual whom he seeks to affect with it." According to the judgment in the last mentioned case, if it is intended to proceed against parties, who are members of the company at the time of the judgment, a *scire facias* may be issued without leave of the Court; but if it is sought to affect parties who were only members at the time of the contract, application must be made to the Court for leave for that purpose. In the case of *Harrison v. Timmins* (c), it was decided that where an act of parliament, regulating a joint stock company, gives the public a right to sue any one of the directors as

(a) *Bosanquet v. Ransford*, in Q. B., 4 Jurist, 457. *Whittenbury v. Law*, in C. P., 4 Jurist, 485. *Buckley v. Marston*, and *Cross v. Law*, in the Exchequer, 4 Jurist, 802.

(b) See *Penoyer v. Brace*, 1 Lord Raym. 245., 1 Salk. 319.; *Buxton v. Mardin*, 1 T. R. 82.; *Queen v. Ford*, 2 Lord Raym. 763., 2 Wms. Saund. 6. in notes.

(c) 4 Mees. & Wels. 510.

a nominal defendant to the action, execution cannot issue against that defendant personally, unless the act contains express words to that effect.

Page 210. line 10.

And where a plaintiff had taken two joint debtors in execution on a judgment against them, and having allowed one to be discharged, afterwards consented to the discharge of the other, in consideration of his undertaking to pay a sum of money; a verdict having been found for the plaintiff, it was held, on a motion in arrest of judgment, that, as the situation of the one depended on the legal result of the discharge of the other debtor, and as by the first discharge the debt had been in point of law satisfied, there was no consideration for the subsequent promise by the other debtor. (a)

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## SECTION II.

### *Equitable Remedies against Partners.*

Page 212. line 26.

IN the late case of *Attwood v. Small*, which came before the *Lord Chancellor* on appeal from the *Vice Chancellor*, and in which the objection was made that all the shareholders were not made parties defendants to the suit, Lord *Cottenham* observed, "Now, it is said, there are three descriptions of persons who are not brought before the Court; and, amongst the three, one set of persons are, all the shareholders of the company. With regard to this, seeing what is stated in the bill, and looking at the authorities on the question, there is no ground upon which the objection can be maintained. The bill alleges that there are 600 shareholders, and that they are constantly varying, the shares being transferable; and states a case, therefore, that makes it utterly impossible that the plaintiff could pursue his remedy, if he must pursue it, by bringing before the Court and keeping there all persons who are shareholders. The case of

(a) *Herring v. Dorrell*, 4 Jurist, 800.

*Adair v. The New River Company* (a), and *Meux v. Maltby* (b), in which that was considered, have saved me from the necessity of doing that, which I certainly should have done, if I had not found authorities already standing in the books, of adopting the rule which it was necessary to adopt, in order to prevent the grossest injustice from being practised by companies of this description. To say, that they are to be permitted to sue on behalf of themselves and others, because they are so numerous, that they cannot be brought before the Court, and then to say, that persons, by whom they are sued, are not to be at liberty to bring those, who are plaintiffs against them, before the Court, without bringing all the shareholders, would enable them to commit any injustice which they pleased, without the possibility of being made responsible for it. The authorities to which I have referred, and several others, are quite sufficient to show that this Court has adopted a course, which prevents this injustice from taking place. Upon the authority, therefore, of those cases, I am of opinion it is not necessary to bring the shareholders, as such, before the Court." His Lordship afterwards said; "The partnership deed, as stated in the bill, puts the directors in the place of the company, and makes them, for the purpose of any litigation between themselves and others, in my opinion, proprietors of the company. I have impliedly said that, when I said the 600 shareholders are not necessary parties to the suit; but, if they are not necessary parties to the suit as shareholders, there must be some persons, whom those in contest with the company are at liberty to sue. The only other persons held out by the deed, as owners of the property of the company, and competent to deal with individuals, who may have transactions with them, are the directors." (c)

(a) 11 Ves. 429.

(b) 2 Swanst. 277.

(c) 4 Jurist, 239.



## CHAPTER V.

## SECTION I.

*The Causes of the Dissolution of a Partnership.*

Page 222. last line.

IN a late case, in which a bill was filed by the executor of a deceased lunatic partner, praying for an account of the partnership transactions up to the time at which the business was sold, and of the money or other consideration received by the defendant for such sale; and that one third part of the clear profits of the business, and also of the money or other consideration received by the defendant for the sale of the business, might be paid to the plaintiff, it appeared that by articles of partnership, dated the 16th of *February* 1815, between the defendant, who carried on the business of a solicitor, and *James Hardstone*, it was agreed that the partnership should continue for a period of twelve years, unless determined by either party at the expiration of the first five years; that, in consideration of a sum of money paid by *Hardstone* to the defendant, the former should be admitted to one third share of the business; that the defendant should take the charge of such department of the business as he should from time to time elect to superintend; and that he should further be at liberty to reside at the distance of ten miles from the house in which the business was carried on. It also appeared that in *May* 1824, *Hardstone* became incapable of attending to the business in consequence of being afflicted with insanity; and in *August* 1826, he died in a Lunatic Asylum. The defendant continued to carry on the business until the end of the year 1825, when he sold it to a person named *Templar* for the sum of 2000*l.* Sir *John Leach* M. R. said: "It is clear upon principle, that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a

ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider with Lord *Kenyon*, that, in order to make it a ground of dissolution, he must obtain a decree of the Court. If he does not apply to the Court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution. The question, therefore, here is, whether it is not to be considered that between *May* 1824, when *Hardstone* was first affected with insanity, and 1825, when the business was sold, *Noy* carried on the business in the hope that the insanity of his partner would prove only temporary, and would not therefore render a dissolution necessary. I am inclined to think that *Noy* did carry on the business till 1825 in the hope of his partner's recovery; and I am further disposed to give to the plaintiff, the representative of *Hardstone*, the profits of *Hardstone's* share of the partnership up to the period at which the business was sold." (a)

Page 226. line 18.

The marriage of a *feme sole* partner has, in a late case, been held to be a dissolution of a partnership at will; for, otherwise, by her marriage she would introduce a stranger into the partnership, which might be incompatible with the views and interests of the other partners. (b)

Page 227. line 17.

But the Court will not decree a dissolution, unless it be shown that the defendant has substantially failed in the performance of his part of the partnership agreement; and if the ground on which a dissolution is sought arises out of mere partnership squabbles, the Court will not entertain the question, as it is

(a) *Jones v. Noy*, 2 Mylne & Keen, 125.

(b) *Nerot v. Burnand*, 4 Russ. 260.

neither its office nor its duty to enter into a consideration of them. (a)

Page 230. line 16.

In the case of a partnership for an indefinite period, either party may, at any time, put an end to the partnership by a simple notice to his copartner, and *a fortiori* that effect may be produced by a mutual agreement. Therefore, where A. and B. were partners in alum works for an indefinite period, B. being a dormant partner. In *January*, 1829, it was agreed that the settlement of the partnership accounts, and all questions concerning the respective liabilities, and the mode of winding up the affairs, and the manner and time of dissolving the partnership, should be referred to an arbitrator; and it was afterwards agreed that A. and B. should respectively bid for the plant, utensils, and fixtures, and the referee was to declare the highest bidder to be the purchaser. In *April*, 1829, A., having been declared the highest bidder, became the purchaser, and the works were entirely given up to him; and it was decided that the partnership was then determined, although the referee had made no order as to the dissolution; and that A. had no authority after that time to bind B. by a promissory note. (b)

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## SECTION II.

### *The Consequences of the Dissolution of a Partnership.*

Page 231. line 8.

THE effect of the dissolution of a partnership is to absolve the partners from all liability to third persons in respect of future transactions; but it cannot exempt them from the liability consequent upon and inseparable from the past transactions of the partnership. Therefore, it has been decided that a general dissolution of partnership between A. and B. does not operate to discharge A. from his responsibility for the subsequent con-

(a) *Wray v. Hutchinson*, 2 Mylne & Keen, 235.

(b) *Heath v. Sansom*, 4 B. & Adolp. 172.

duct of B., in respect of the engagements of the partnership with third persons, made prior to the dissolution. (a)

Page 242. line 18.

Where a dissolution of partnership took place between A. and B., and it was agreed, not only that the business should be carried on by B., but that he should receive and pay all debts, and sufficient joint effects for that purpose were left in his possession. After the dissolution, C., a creditor of the firm, applied to B. for payment of his debt; when he was informed that A. knew nothing about it, and that C. must look to B. alone. C. then drew a bill on B., which he accepted, but which was afterwards dishonoured; and it was held, in an action brought by C. against A. and B. (the latter having become bankrupt), that it was a question for the jury, whether it had been agreed between C. and B., that C. should accept B. as his sole debtor, and take his acceptance in satisfaction of the debt due from the two partners; and that question of fact being answered in the affirmative, it was also determined, that such an agreement and receipt of the bill would be a good defence to C.'s action, by way of accord and satisfaction; and that the fact of B. having had the partnership effects left in his hands, and having agreed with A. to pay all the partnership debts, was evidence of an authority from A. to make such an agreement on his behalf. (b)

Page 248. line 4.

Where a lease of premises has been taken in the partnership name, a retiring partner will continue responsible for future rent, if no surrender of the lease is made and accepted on his retirement; and that although the landlord had notice of his retirement, and received rent both from the remaining partner singly, and from him and a new partner with whom he afterwards contracted a partnership, and although he wrote a letter to his attorneys (which, however, was not sent) desiring them to prepare a lease to the new partnership. (c)

(a) *Ault v. Goodrich*, 4 Russ. 430.

(b) *Thompson v. Percival*, 5 B. & Adolp. 925. In this case the authority of *David v. Ellice*, 5 B. & C. 196. was denied. And see *Kirwan v. Kirwan*, 2 Crompt & Mees. 617.; *Hart v. Alexander*, 2 Mees. & Wels. 483.

(c) *Graham v. Whichelo*, 1 C. & M. 188.



## Page 251. line 5.

Where a dissolution of partnership takes place between an ostensible and a dormant partner, it is not necessary, for the protection of the ~~later~~ ~~trans~~ transactions subsequent to the dissolution, that notice of such dissolution should be given to the creditors of the firm. (a) In a late case, where S. and others carried on business under the name of the "*Plas Madoc Colliery Company*," and S. withdrew from the firm, which afterwards became indebted to C., no notice having been given to C. or the public of S.'s withdrawing; it was held that S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know of it. (b) In this case Mr. Justice *Parke* observed, "S. may by his conduct have represented himself as a partner, and induced the plaintiff to give him credit as such, and so be liable to the plaintiff. Such would have been the case if he had done business with the plaintiff before as a member of a firm, or had so publicly appeared as a partner as to satisfy a jury that the plaintiff must have believed him to be such; and if he had suffered the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner after he really had ceased, he would be responsible for the consequences of his original representation, uncontradicted by a subsequent notice. But, in order to render him liable on this ground, it is necessary that he should have been known as a member of the firm to the plaintiffs, either by direct transactions or public notoriety. In the present instance that was not so. The name of the company gave no information as to the parties composing it, and the plaintiff did not show that S. had dealt with him in the character of a partner, or had held himself out so publicly to be one, as that the plaintiff must have known it." And where A. and B. being partners in alum works for an indefinite period, B. as a dormant partner, in *January*, 1829, agreed that the settlement of the partnership accounts, and all questions concerning the respective liabilities, and the mode of winding up the affairs, and the manner and time of

(a) Per *Patteson, J.*, *Heath v. Sansom*, 4 B. & Adolp. 177.; *Brooke v. Enderby*, 2 Brod. & Bingh. 71. S. C. 4 B. Moore, 501.

(b) *Carter v. Whalley*, 1 B. & Adolp. 11.

dissolving the partnership, should be referred to an arbitrator; and it was afterwards agreed that A. and B. should respectively bid for the plant, utensils, and fixtures, and the referee was to declare the highest bidder to be the purchaser. In *April*, 1829, A., having been declared the highest bidder, became the purchaser, and the works were entirely given up to him; and it was held, that the partnership was then determined, although the referee had made no order as to the dissolution: and that A. had no authority, after that time, to bind B. by a promissory note. (a)

Page 251. line 27.

In *Abel v. Sutton*(b), Lord *Kenyon* said, "To contend that this liability to be bound by the acts of his partner extends to time subsequent to the dissolution, is, in my mind, a most monstrous proposition. A man, in that case, can never know when he is to be at peace, and retired from all the concerns of the partnership." But where the partner, who had retired, stated that he left the joint effects in the hands of the remaining partner, for the purpose of winding up the concern, and that he had no objection to his using the partnership name, it was held, that the jury were justified in concluding that the remaining partner had authority to indorse, in the partnership name, promissory notes which formed a part of those joint effects. (c)

Page 252. line 30.

So, to an action brought by B. against C., on a bill drawn by B. and accepted by C., after the dissolution of the partnership of A. and B., but for a debt due from C. to that partnership, Lord *Tenterden* held, that it was no answer for C. that, by the terms of the dissolution, A. only was to receive the debts of the firm; for that, after a dissolution of partnership between two partners, either partner may receive a debt due to the firm, notwithstanding a stipulation in the deed of dissolution that one shall receive all the debts. (d)

(a) *Heath v. Sansom*, 4 B. & Adolp. 172.

(b) 3 Esp. N. P. C. 108.

(c) *Smith v. Winter*, 4 Mees. & Wels. 454.

(d) *King v. Smith*, 4 Car. & Pay. 108.

## SECTION III.

*The Consequences of a Dissolution by Bankruptcy*

Page 307. line 4.

And in a more recent case, after the bankruptcy of one of two partners, the solvent partner, thinking the firm capable of paying its debts, continued the business, and paid partnership money into a banker's, to be applied in discharge of running bills of the firm, payable at the bank, and which was so applied; and it was held, that this payment having been made *bonâ fide*, and without any contemplation of bankruptcy by the solvent partner, was valid at law. (a) In this case it was contended by the counsel for the plaintiffs that the case of *Harvey v Crickett*(b) was wholly inconsistent with the judgment of Lord Eldon In re *Wait*(c), the effect of which decision was, that as the bankruptcy of one partner wholly put an end to the partnership, the solvent partner had no power after the bankruptcy to dispose of any part of the joint property; but Lord Denman, in disposing of this objection, said, "It was, however, urged that the case In re *Wait*, decided by Lord Eldon, was a subsequent authority to the contrary; and if, upon referring to that case, we thought that it had thrown any doubt upon the previous decisions in courts of law upon this subject, we certainly should have granted a rule, with a view to the reconsideration of so important a question. But we are clearly of opinion that the authority of those cases is left untouched. The Chancellor sitting in bankruptcy, exercises both a legal and *equitable* jurisdiction; and in the case cited, and in that of *Dutton v. Morrison*(d), Lord Eldon is considering the equitable rights of the assignees of the bankrupt partner, representing the general creditors." The assignees and the solvent partner, in the case of *Woodbridge v. Swann*, afterwards opened a fresh account at the

(a) *Woodbridge v. Swann*, 4 B. & Adolp. 633.

(b) 5 Mau. &amp; Selw. 336.

(c) 1 Jac. &amp; W. 608.

(d) 17 Ves. 194.

Bank, and paid in a sum of money to discharge a debt on the old account, which carried interest. The second partner then became bankrupt; and it was determined, that the assignees of the two could not recover this last sum; for as the assignees of the partner who was first bankrupt, with the then solvent partner, could not have recovered it back, so it was clear that the assignees of both had no right to sue for it. (a)

Page 332. line 25.

It has been held that notice of the insolvency of the bankrupt does not prevent the creditor's right of set-off within the 6 Geo. 4. c. 16. s. 50. (b)

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## SECTION IV.

### *The Consequences of a Dissolution by Death.*

Page 348. line 30.

It is undoubted, generally speaking, that the surviving partners in a firm may sue for a debt due to the firm, without making the personal representative of a deceased partner a party to the suit; and it is the practice of a court of equity, where two firms are dealing together, and one of the members is a partner in both, to treat them, altogether, as distinct firms. But in a recent case, where A. and B. deposited with a firm, of which A. was a member, the title deeds of an estate of which they were joint owners, as a security for a debt due from them to the firm, and A. died intestate. The surviving partners in the firm having filed a bill against his heir and B. for a sale of the estate, it was held that the personal representative of A. ought to have been made a party to the suit; and on this ground, that as between A. and his partners the debt may have been satisfied, and as the heir had a right to throw the burden of the debt on the personal in exoneration of the real estate of A., the

(a) 4 B. & Adolp. 633.

(b) Hawkins v. Whitten, 10 B. & C. 217.



accounts could not be investigated in the absence of his personal representative. (a)

Page 349. line 26.

In the late case, however, of *Lewis v. Langdon*(b), Sir *Launcelot Shadwell* intimated a strong opinion that the goodwill survived; and in the course of his judgment observed, "Lord *Eldon*, certainly, has expressed a doubt, in the case of *Crawshay v. Collins*(c), upon what has been understood to be the proposition laid down, by Lord *Rosslyn*, in the case of *Hammond v. Douglas*. (d) It is true that the question might have been, to a certain degree, whether, having regard to what had taken place, the money should be considered to belong to one party rather than to another: and it is, also, observable that Lord *Eldon* might have been throwing out his observations with reference to a supposed connection between the place where the business was carried on and the goodwill. But it occurs to me that, if the goodwill is to be considered as a saleable article which belongs to the partnership, then this consequence must follow, namely, that the surviving partner must be under an obligation to carry on the trade for some time after his partner's death, in order that the thing which is said to be saleable may be preserved until it can be sold. If a partnership were carried on between A. and B. under the name of *Smith & Co.*, and the surviving partner chose to discontinue the business, and to write to the customers and say that his partner was dead, and that the business was at an end, the effect would be that that which is said to be saleable would cease to exist. Now what power is there in a court of equity, to compel a partner to carry on a trade after the death of his copartner, merely that, at a future time, the goodwill, as it is called, may be sold? It is plain that, unless there is such a power in this Court, it must be in the discretion of the surviving partner to determine what shall be done with the goodwill; and, if that is the case, it must be his property. I cannot but think, when two partners carry on a business in partnership together under a given name, that, during the partnership, it is the joint right of them both to carry on the business under that name, and that, upon the death

(a) *Scholefield v. Heafield*, 7 Sim. 667.

(b) 7 Sim. 421.

(c) 15 Vesey, 227.

(d) 5 Vesey, 55.

of one of them, the right which they before had jointly becomes the separate right of the survivor."

Page 352. line 11.

In a late case, an account of a deceased partner's estate was directed after a lapse of thirty years, and repeated changes in the firm, and after several deeds and a release had been executed by the parties beneficially interested; the surviving partners being the executors of the deceased partner and guardians of the *cestuis que trust*, and the settlements being partial only, and founded on insufficient knowledge, by the *cestuis que trust*, of the partnership affairs and accounts. (a)

Page 353. line 2.

Where, by the death of a partner, the joint business is determined, the survivor has the sole equitable, if not the legal, right to carry on the trade under the name and designation of the old partnership firm. Thus, where A. and B. carried on business under the firm of A. and L., and A. dying, B. continued the business under the firm of B. and Co., *successors* to A. and L. A.'s executor, having commenced the same business, under the firm of A. and L., an injunction was granted to restrain him from using the name of that firm, until the right should have been tried at law. (b)

Page 353. line 24.

Where, by articles of partnership, it was agreed, that just and true accounts should be made out, half yearly, and signed by the partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners; and it appeared the accounts were made out by one of the partners; and, after the death of two of the other partners, it was ascertained that the accounts were fraudulent; it was determined that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles. (c)

(a) *Wedderburn v. Wedderburn*, 2 Keen, 722.

(b) *Lewis v. Langdon*, 7 Sim. 421.

(c) *Oldaker v. Lavender*, 6 Sim. 239.

Page 360. line 13.

And the creditor has a right to resort to the assets of a deceased partner in the first instance, even although there be a surviving solvent partner. Thus, where it appeared the plaintiff was a creditor of the partnership firm of *Shepherd* and *Hartley*, and *Shepherd* having died, the bill was filed by the plaintiff on behalf of himself, and all other the joint creditors of *Shepherd* and *Hartley*, against the executors of *Shepherd*, and against *Hartley*, the surviving partner; and it prayed payment of the partnership debts out of the estate of *Shepherd*. On the part of the defendants, the executors of *Shepherd*, it was objected, that no decree could be had for payment of the partnership debts out of the estate of *Shepherd*, inasmuch as it did not appear that *Hartley*, the surviving partner, was insolvent. But Sir *John Leach* said, "All the authorities establish that, in the consideration of a Court of Equity, a partnership debt is several as well as joint. The doubts upon the present question seem to have arisen from the general principle, that the joint estate is the first fund for the payment of the joint debts, and that, the joint estate vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner before he seeks satisfaction from the assets of the deceased partner. It is admitted that, if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is, whether the joint creditor shall be compelled to pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if any thing, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the surviving partner is, at all events, liable to the full satisfaction of the creditors, and must first or last be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance, and that great

inconvenience and expense might otherwise be occasioned to the joint creditors; and further, that according to the two decisions in *Sleech's* case (a), in the cause of *Devaynes v. Noble*, the creditor was permitted to charge the separate estate of the deceased partner, which in equity was not primarily liable, as between the partners, without first having resort to dividends which might be obtained by proof under the commission against the surviving partner, I am of opinion that the plaintiff is entitled in this case to a decree for the benefit of himself, and all other joint creditors, for the payment of his debt out of the assets of *Shepherd*, the deceased partner." (b) The case of *Wilkinson v. Henderson* was recognised and acted upon by Mr. Baron Alderson in *Thorpe v. Jackson* (c), in which that learned judge decided, not only that a creditor has a right to resort to the assets of a deceased partner before the insolvency of the surviving partners is established, without regard to the relations which may have subsisted between the partners, but also that every joint debt, whether contracted by joint traders and in reference to mercantile transactions or not, is in equity to be deemed joint and several. No decree, however, can, in such a suit, be made against the surviving partner, the remedy against him being altogether at law; but it is proper to join him as a defendant to the suit, as he is interested to contest the demand of the plaintiff, and of all other persons claiming to be joint creditors. (d)

Page 361. line 36.

Where the plaintiff was a creditor in respect of deposits made with a banking firm, and one of the partners died, and no claim was made against his estate for nine years afterwards, when a bill was filed praying for payment out of the estate, Lord *Langdale*, on the grounds that the creditor of a partnership had a right to avail himself, not only of the nature of the contract, but also of the equities subsisting between the parties; that the surviving partners might, as to past transactions, (in respect to which they were subject to liability in common with the estate of the deceased partner), be not unreasonably considered as acting not

(a) 1 Meriv. 539.

(b) *Wilkinson v. Henderson*, 1 Mylne & Keen, 582. See also *Devaynes v. Noble*, 2 Russ. & M. 495.

(c) 2 You. & Coll. 553.

(d) *Wilkinson v. Henderson*, 1 Mylne & Keen, 582.



only for themselves but also on account of the estate of the deceased partner; that the demand was clearly kept up against the surviving partners; that one of the surviving partners was one of the executors of the deceased partner, acting as such, and also one of the legatees of the interest of the deceased partner in the concern; and that the testator had made charges on his real estate for the payment of his debts, determined that the case did not fall within the operation of the statute of limitations, and decreed payment to the plaintiff accordingly. (a)

Page 362. line 7.

Where one of the surviving partners is the executor of the deceased partner, it seems that, to exonerate the testator's estate from future liability, due notice ought to be given of the testator's death to the creditors of the firm; because, in the absence of such notice, the executor partner, in his character of personal representative of the deceased, has power to bind his estate. (b)

Page 363. line 22.

Where a creditor, after the death of a partner, continued to deal with the survivor for upwards of eight years, and down to the time of the bankruptcy of the latter, without requiring payment of the balance due to him, but no security from the surviving partner was taken, nor was there any evidence of an intention to release the estate of the deceased, or to abandon the original claim against the partnership, but on the contrary it appeared that the forbearance was occasioned by a desire not to injure the interests of the family of the deceased, as well as from motives of kindness to the survivor, Lord *Cottenham* decided, that the creditor had not substituted the individual credit of the surviving partner for the joint liability of the firm, and that the debt was not to be considered as having been assumed by the survivor, so as to discharge the deceased's estate. (c)

(a) *Braithwaite v. Britain*, 1 Keen, 206.

(b) *Vulliamy v. Noble*, 3 Meriv. 614.

(c) *Winter v. Innes*, 4 Mylne & Craig, 101.



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- by a single partner, out of partnership funds, makes the contract joint, 35.
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- when an action may be maintained by some of the partners against a third person for a *tort*, 33.
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- when one partner may sue separately, 38.
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- a bankrupt partner need not be joined in an action against the firm, 53.
- when a release renders a partner a competent witness for his copartner, 55.
- outgoing partner not relieved from responsibility in respect of past transactions, 65.
- retiring partner, when bound by the continuing partner's indorsement of a bill or note after a dissolution, 68.
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- the insanity of one partner a ground for the dissolution of the partnership, 63.
- but a decree of a Court of Equity must be obtained for that purpose, 64.
- where that is not obtained, the insane partner entitled to share in the profits made during his malady, *ib.*
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THE END.















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